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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 231.

JOHN DOBSON AND JAMES DOBSON, TRADING AS JOHN AND JAMES DOBSON, AND ALSO AS "THE FALLS OF SCHUYLKILL CARPET MILLS," APPELLANTS,

vs.

THE HARTFORD CARPET COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JULY 7, 1882.

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1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania in the Third Circuit. In Equity.

THE HARTFORD CARPET COMPANY

vs.

JOHN DOBSON and JAMES DOBSON, doing business under the name and style of John and James Dobson and of "The Falls of Schuylkill Carpet Mills."

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania in the third circuit of April session 1879, No. 30.

It is thus contained:

Be it remembered that on the 26th day of April A. D. 1879, The Hartford Carpet Company, by Joseph C. Fraley and A. V. Briesen, Esqs., their solicitors, come into our said court here and file of record their bill of complaint against John Dobson and James Dobson, doing business under the name and style of John and James Dobson and of "The Falls of Schuylkill Carpet Mills," which said bill being read is as follows, to wit:

2 Circuit Court of the United States for the Eastern District of Pennsylvania. In Equity.

THE HARTFORD CARPET COMPANY

vs.

JOHN DOBSON and JAMES DOBSON, doing business under the name and style of John & James Dobson and of "The Falls of Schuylkill Carpet Mills."

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania:

The Hartford Carpet Company, a corporation duly organized under the laws of the State of Connecticut, and doing business at Enfield and at Hartford, Hartford county, Connecticut, and also at the city of New York, county of New York, and State of New York, brings this its bill of complaint against John Dobson and James Dobson, individually and collectively, both being residents of Philadelphia, Pennsylvania, and doing business in the name and style of John & James Dobson, and also in the name and style of "The Falls of Schuylkill Carpet Mills," at Philadelphia, State of Pennsylvania, and thereupon your orator complains and says:

That one Winthrop L. Jacobs was and is the original and first inventor and producer of a new and original design for
3 carpets, fully described in the letters patent hereinafter mentioned, and which had not been known or used before said Winthrop L. Jacobs' said invention and production, and which was not more than two years before his application for a patent, as hereinafter mentioned, in public use, or on sale with his consent or allowance, and which he, said Winthrop L. Jacobs, has invented and produced by his own industry, genius, efforts, and expense.

And your orator, on information and belief, further shows unto your honors that your orator having, by assignment, duly executed and recorded in the United States Patent Office, acquired from said Winthrop L. Jacobs all the said Winthrop L. Jacobs' right, title, and interest in and to said invention, and the letters patent, when issued therefor, did, on the 18th day of March, 1879, upon due application therefor, obtain letters patent of the United States for said invention, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid, and numbered 11074, whereby there was granted and secured to your orator as assignee of said Winthrop L. Jacobs, and to your orator's assigns, or intended so to be, for the term of three and one-half years from and after the date of said letters patent, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention and design, as set forth in said letters patent, which, or a duly certified copy of which, is ready here in court to be produced, and by virtue whereof your orator became and now is the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said letters patent.

And your orator further shows unto your honors that by virtue of the premises your orator became, and now is, the sole and exclusive owner of said letters patent, and the inventions and design described therein, and of all the rights and privileges granted and secured, or intended to be granted and secured, thereby. And that your orator has invested and expended large sums of money, and has been to great trouble in and about said invention, and for the purpose of carrying on the business of manufacturing and
4 selling carpets which embody said design, and making the same profitable to itself and useful to the public, and that said invention has been, and is, of great benefit and advantage; and that large quantities of carpets were made according to said invention, and sold by your orator, to the great advantage of the public; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and your orator believes that it will realize and receive large gains and profits therefrom if infringements by said defendants and their confederates shall be prevented.

Yet the said defendants, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator, and to deprive it of the benefits and advantages which might and otherwise would accrue unto your orator from said invention, ever after the issuing of the said letters patent as aforesaid, and before the commencement of this suit, did, as your orator is informed and believes, without the license or allowance, and against the will of your orator, and in violation of its rights, and in infringement of the aforesaid letters patent, at the city of Philadelphia, and at other places, unlawfully and wrongfully, and in defiance of the rights of your orator, make, construct, use, and vend to others to be used the said invention, and did make, construct, use, and vend to others to be used carpets made according to and employing and containing

said invention, and that the said defendants and their confederates still continue so to do; and that they are threatening to make the aforesaid carpets in large quantities, and to supply the market therewith, and to sell the same.

All in defiance of the rights acquired by and secured to your orator as aforesaid, and to your orator's great and irreparable loss and injury, and by which your orator has been and still is being deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed, by the said defendants by and through their aforesaid unlawful acts and doings.

And your orator further shows unto your honors, on information and belief, that said defendants have made and sold, and caused to be made and sold, large quantities of said carpets, and have a large quantity on hand which they are offering for sale, and have made and realized large profits and advantages therefrom; but to what extent and how much exactly your orator does not know, and prays a discovery thereof. And your orator says that the use of the said invention by said defendants, and their preparation for and avowed determination to continue the same and their other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to, and do, encourage and induce others to venture to infringe said patent in disregard of your orator's rights.

And your orator further shows unto your honors that it has caused notice in writing to be given to said defendants of said infringements, and of the rights of your orator in the premises, and requested said defendants to desist and refrain therefrom; but said defendants disregarded said notice, and refused to desist from said infringements, and continued, and still continue, to make and sell said carpets which are made in infringement of said letters patent, after the receipt of said notice, without right.

And your orator prays that said defendants, John Dobson and James Dobson, individually, and also in the name and style of John & James Dobson, and of "The Falls of Schuylkill Carpet Mills," and their and each of their servants, agents, attorneys, and workmen, and each and every of them, may be restrained and enjoined, provisionally and perpetually, by the order and injunction of this honorable court, from directly or indirectly making, constructing, using, vending, delivering, working, or putting into practice, operation, or use, or in anywise counterfeiting or imitating the said invention, or any part thereof, or any carpets made in accordance therewith, or like or similar to those which the said defendants have heretofore made; and that the said defendants may be decreed to pay the profits unlawfully obtained by them by reason of the aforesaid infringement and the damages thereby suffered by your orator, and the costs of this suit, and that your orator may have such further relief, or such other relief, as to this honorable court shall seem meet, and as shall be agreeable to equity.

And forasmuch as your orator can have no adequate relief except in this court, to the end, therefore, that the said defendants may,

6 if they can, show why your orator should not have the relief hereby prayed, and may, upon their, and each of their corporal oaths, according to their, and each of their, best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your orator the profits by them acquired, and the damages suffered by your orator from the aforesaid unlawful acts.

May it please your honors to grant unto your orator the writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this honorable court, commanding, enjoining, and restraining the said defendants, John Dobson and James Dobson, individually, and also in the name and style of John & James Dobson, and of "The Falls of Schuylkill Carpet Mills," and their, and each of their, servants, agents, attorneys, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, directed to the said defendants, John Dobson and James Dobson, commanding them, by a certain day and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against them.

And your orator will ever pray, &c.

THE HARTFORD CARPET COMPANY,
By JOHN L. HOUSTON, *President.*

A. v. BRIESEN,
Comp't's Sol'r and of Counsel, No. 229 *Broadway, New York.*

7 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

On this 24th day of April, 1879, before me personally appeared John L. Houston, president of the Hartford Carpet Company, the above-named complainant, who, being by me first duly sworn, deposes and says: That he is the president of the Hartford Carpet Company, the above complainant; that he has read the foregoing bill of complaint subscribed by him for the said Hartford Carpet Company, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; and that the said Hartford Carpet Company is a corporation duly organized under the laws of the State of Connecticut; and that he verily believes Winthrop L. Jacobs to be the first, original, and sole inventor and producer of the design for carpets described and claimed in the letters patent referred to in said bill of complaint.

JOHN L. HOUSTON, *President.*

Subscribed and sworn to before me, this 24th day of April, 1879.

[L. S.] T. B. MOSHER,
Notary Public.

(Endorsed:) No. 30. April sess., 1879. United States circuit court, eastern district of Pennsylvania. The Hartford Carpet Company *vs.* John Dobson and James Dobson. Bill in equity. Filed April 26, 1879. Arthur v. Briesen, complainant's solicitor, 229 Broadway, New York, N. Y.

8 And afterwards, to wit, on the 11th day of July, A. D. 1879, the complainants, by their solicitors, come into our said court here and enter an order that the bill of complaint be taken *pro confesso*, which said order being read, is as follows, to wit:

United States Circuit Court, Eastern District of Pennsylvania.

THE HARTFORD CARPET COMPANY
vs.
JOHN DOBSON and JAMES DOBSON, doing business under the name and style of John and James Dobson, and of "The Falls of Schuylkill Carpets Mills." } In Equity.

The bill of complaint herein having been duly filed on the 26th day of April, 1879, and the subpœnas being duly issued and served on the defendants, and the defendants having on the rule day of June, 1879, entered their appearance by George E. Buckley, Esq., and having failed by this 11th day of July, 1879, to file their plea, answer, or demurrer to the bill of complaint, although the time for so doing has expired: Now, therefore, on motion of A. v.
9 Briesen, complainant's solicitor, it is ordered that the bill of complaint herein be taken *pro confesso* against said defendants, with costs, profits, and damages, to be taxed by the clerk of this court, according to the prayer of the bill of complaint.

A. v. BRIESEN,
Compl't's Solicitor.

(Endorsed:) No. 30. April sess., 1879. U. S. circuit court, eastern district of Pennsylvania. The Hartford Carpet Co. *vs.* J. and J. Dobson. In equity. Order that bill be taken *pro confesso*. Filed July 11, 1879.

10 And afterwards, to wit, on the 2nd day of September, A. D. 1879, this cause coming on to be heard on the order that the bill be taken *pro confesso*, the court enter the following decree, to wit:

U. S. Circuit Court, E. Dist. of Pa. In Equity. April Session, 1879.

THE HARTFORD CARPET COMPANY
vs.
JOHN DOBSON and JAMES DOBSON, trading as John & James Dobson. } No. 30.

And now, to wit, this second day of September, 1879, this cause came on to be heard in the presence of counsel for the complainant, and it appearing to the court that service of the subpœna issued in the cause had been duly accepted by the solicitor for the defendants,

and that the appearance of their said solicitor had been duly entered on behalf of the defendants on Monday, the second day of June, 1879, and that the time for filing an answer by the defendants had long since expired, and no answer had been filed, and that an order for taking the bill of complaint *pro confesso* had been duly filed after said default of the defendants, and more than thirty days before the entry of this present decree:

On motion of the counsel for complainant, it is ordered that the bill of complaint be, and the same hereby is, taken as confessed by the defendants; and the court doth thereupon further order and decree that the letters patent No. 11074, dated March 18, 1879, for a new and original design for carpets, are good and valid, and that the title to the same is duly vested in the complainant, and that the defendants have infringed the same; and it is further ordered and decreed that the said defendants, and each of them, their servants, attorneys, agents, and workmen, be perpetually enjoined and restrained from further infringement of the said letters patent; and it is further ordered and decreed that the complainant do recover from the defendants the gains and profits which the said defendants have made by their aforesaid acts of infringement, and also the damages which the complainant has sustained thereby, and that it be referred to Francis T. Chambers, Esq., as master, to take an account of said profits and assess said damages; and it is further ordered and decreed that the complainant do recover from the defendants its costs, charges, and disbursements in this cause to be taxed

11 (Endorsed:) U. S. circuit court, east. dist. of Pa. In equity. No. 30. April sess., 1879. Hartford Carpet Co. *vs.* John Dobson and James Dobson, trading as John and James Dobson. Decree for injunction and account. Entered September 2, 1879.

12 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *ss:*

[SEAL.] The President of the United States to John Dobson and James Dobson, trading as John and James Dobson, and "The Falls of Schuylkill Carpet Mills," Greeting:

Whereas the Hartford Carpet Company lately exhibited its bill of complaint in the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, against you, the said defendant, praying to be relieved touching the matters therein complained of, and especially that you, John Dobson and James Dobson, trading as John and James Dobson, and "The Falls of Schuylkill Carpet Mills," and all acting under you, and each of you, may be restrained from further infringing the patent and the rights of the said complainant in the premises, in the said bill mentioned, in any way or manner contrary to law or equity:

We, therefore, in consideration thereof, and also of the particular matters in the said bill set forth, do strictly command and enjoin you, the said John Dobson and James Dobson, trading as John and James Dobson, and "The Falls of Schuylkill Carpet Mills," your servants, workmen, and agents, and all others acting under

or with you, and each and every of you, that from henceforth you do absolutely and entirely desist and refrain from the further constructing or using or selling, in any way or manner, directly or indirectly, the new and original design for carpets described in letters patent of the United States No. 11074, dated March 18th, 1879, described in the said bill of complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this sixth day of September, A. D. 1879, and in the one hundred & fourth year of the Independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court.

13 On this 12th day of September, A. D. 1879, personally appeared Charles H. Cake, U. S. deputy marshal, and made oath that he served the within writ on John Dobson and James Dobson by reading the same in their hearing and leaving a true and attested copy thereof with each of them, September 9th, 1879.

CHAS. H. CAKE.

Before me—

W. VON A. WILLIAMSON,
Pro. Clerk.

[Endorsed:] No. 30. Circuit court, April sess., 1879. Hartford Carpet Co. *vs.* Dobson *et al.* Injunction. A. v. Briesen, solicitor for complainant. Returned October 6, 1879.

14 And afterwards, to wit, on the 18th day of January, A. D. 1881, the master files his report, which, being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania. April Session, 1879. In Equity.

THE HARTFORD CARPET COMPANY
vs.
JOHN DOBSON and JAMES DOBSON, trading as John and James Dobson. } No. 30.

To the honorable the judges of the said court:

The master appointed by the court to ascertain and take and state and report to the court an account of the gains and profits and savings and advantages which the said defendants have received, or which have arisen or accrued to them from the infringing of the exclusive rights of the said complainants to the manufacture, use, and sale of the improvements patented in the letters patent granted to Winthrop L. Jacob, assignor to the Hartford Carpet Company, for a design for a carpet, and which letters patent are numbered 11074, and bear date of March 18, 1879, as well as of the damages the complainants have sustained thereby, respectfully reports:

That at the request of the parties he held three meetings on the 29th of October, and the 1st and 3d of November, 1879, respectively, at his office 901 Walnut street, Philadelphia, Pa., when he was at-

tended by Joseph C. Frailey, Esq., of counsel for the complain-
15 ants, and George E. Buckley, Esq., counsel for the defendants.

An adjournment was then asked with the view of effecting an amicable settlement between the parties of the matters referred to the master. The negotiations proved ineffectual, and the proceedings before the master were renewed on the 26th of May, 1880, at the office of A. van Briesen, Esq., of counsel for the complainants, No. 229 Broadway, New York city, and continued during two subsequent meetings, at which the master was attended by A. van Briesen, Esq., of counsel for the complainants, and George E. Buckley, Esq., of counsel for the defendants.

At this last meeting the testimony was, by agreement, taken stenographically, and was entitled not only in the present case, but also in two others cases in which the Bigelow Carpet Company was complainant, and John and James Dobson, the defendants. These cases are both of April session, 1879, and numbered respectively 34 and 35, and referred to this master for a determination of similar questions to those arising in this suit. No testimony was taken on the part of the defendants. This testimony the master is, at any time, ready to report to the court, if it is so ordered.

At the final argument the counsel for the complainants expressly waived and abandoned all claim to the gains and profits which had accrued to the defendants by reason of the infringement, and limited his claim to the damages which it is urged the testimony shows the complainants to have suffered by reason of the infringement.

By the testimony of James Dobson it appears that the defendants sold of the infringing design twenty pieces (a piece, by agreememt of counsel, is to be considered as containing fifty yards). Twelve of these pieces were sold at wholesale at the price of $1.20 per yard, the remaining eight pieces were retailed at $1.50 per yard.

The testimony of the witness, William Fowler, is relied upon by the complainants as showing the number of pieces of carpet having the patented design which were sold by the complainants before and after the infringement. This witness states that during the first six months when this design was on the market eight hundred pieces thereof were sold, afterwards correcting himself and giving the figures as 816 or thereabouts. In the following eleven months he states the sales to have been 380 pieces. Upon cross-examination it ap-
16 peared that this witness' figures were taken from the books of the company, and a call for the production of the said books was made by the defendants' counsel, it appearing that the witness had no knowledge other than that derived from the books. The witness, under instruction of the complainants' counsel, refused to produce the books, and his evidence on this point was duly objected to by the defendants' counsel, which objection was urged at the final hearing before the master. The Master is of the opinion that the objection was properly taken, and should be sustained, and that there is, therefore, no competent testimony before him showing what the amount of carpets was which was sold by the complainant company either before or after the infringement. This witness is also relied upon by the complainants to show what the decrease in their sales consequent upon the

defendants' infringement were, and he estimates the same as four hundred pieces. This estimate, however, which does not pretend to be anything but an approximation founded upon general experience of similar infringements and their effects, is premised on his evidence as to the amount of the complainants' sales, and the master is, therefore compelled to disregard it. Upon this estimate, and upon the testimony of the witness Holder, a New York manufacturer, who estimates the cost to the complainants of their carpet as $1.00 to $1.08 per yard, and the witness James, who says that the said carpets were sold at the rate of $1.75 per yard, complainants' counsel founds his principal claim for damages, to wit: sixty-seven cents per yard on 400 pieces of carpet, or a total of $13,400. Without going into the question as to whether the said sum, or estimated profit of sixty-five cents per yard, is shown to be actually the profit accruing to the complainants on their sales, the master is compelled to entirely disregard this claim as being founded upon inadmissable evidence.

A further sum of $3,000 is urged by complainants' counsel as being the expenditure of the complainants in getting up other designs, and in changing their looms to make other carpets, which change, it is claimed, was forced upon them by the infringement. This claim is also founded upon the estimate of the witness Fowler, and is founded on so many assumptions, and subject to so many contingencies, that the master is unable to attach any weight to it.

17 Many other witnesses were examined who testified that the inevitable effect of putting carpets on the market having the same design and selling for a less price than a carpet already on sale is to decrease the demand for such original carpet.

While giving full credence to this testimony the master is unable from the testimony before him to ascertain what the extent of this decrease in sales was in the present case.

The master, therefore, awards to the complainants the sum of six cents as their damages for the infringement of the design patent by the defendants.

Respectfully submitted.

FRANCIS T. CHAMBERS, *Master.*

(Endorsed:) No. 30, April sess., 1879. U. S. circuit court, eastern dist. of Pa. The Hartford Carpet Co. *vs.* John & James Dobson. Master's report. Filed January 18, 1881.

18 *Testimony taken before Master.*

United States Circuit Court, Eastern District of Pennsylvania.

Before F. T. CHAMBERS, *Master.*

THE HARTFORD CARPET COMPANY

vs.

JOHN DOBSON and JAMES DOBSON, Trading as John and James Dobson and The Schuylkill Carpet Mills.

Present: Geo. E. Buckley, counsel for defendant, and Jos. Fraley, of counsel for complainant.

Mr. Buckley agrees to produce his witness and books for inspection Saturday, November 1, 1879.

Adjourned till Saturday, November 1, 1879, at 1 p. m.

SATURDAY, *Nov.* 1, 1879.

Met pursuant to adjournment.

Present: Joseph Fraley, counsel for complainant.

Mr. Fraley requests Mr. Chambers, master, to issue summons for the defendant.

Adjourned till Monday, November 3, 1879, at 3 p. m.

MONDAY, *November* 3, 1879.

Met pursuant to adjournment.

Present: Mr. Buckley and Mr. Fraley.

Complainants' counsel offers in evidence patent of W. L. Jacobs, No. 11074, dated March 18, 1879, and the same is marked Complainants' Exhibit No. 1.

Mr. JAMES DOBSON, being duly sworn, deposes and says: I have examined and understand the design marked Exhibit No. 1; we have made twenty pieces of that design and sold them as follows, viz:

7 pieces to Chicago Carpet Co., @	$1 20
3 pieces to J. W. Crossley, @	1 20
1 piece to Samuel Adams, @	1 20
1 piece to John Mathias, @	1 20

8 pieces at retail which we did sell at $1.50 per yard.

The pieces averaging 55 yards. It costs us to manufacture these $1.10 net cash; it costs us to sell as jobbers 6 per cent., at 4 months interest, making in all 8 per cent.

It costs us to sell as retailers 20 per cent. upon the retail selling price. In the retail there is always more or less remnants left which are not near so valuable, and, of course, would have to be sold as remnants for about 75 cents to $1 per yard, according to length, and these pieces there would probably be about 10 yards, and the 20 per cent. which I speak of costing to retail includes the baling, etc.

Adjourned till Monday, November 10, at 3 oclock p. m.

19 EXHIBIT No. 1, F. T. C.

UNITED STATES PATENT OFFICE.

WINTHROP L. JACOBS, of Jersey City, New Jersey, Assignor to Hartford Carpet Company, of Hartford, Connecticut.

Design for a Carpet.

Specification forming part of Design No. 11074, dated March 18, 1879; application filed February 12, 1879. Term of patent, 3½ years.

To all whom it may concern:

Be it known that I, Winthrop L. Jacobs, of Jersey City, in the

county of Hudson and State of New Jersey, have originated and designed a Pattern for Carpets and other Fabrics, of which the following is a full, clear, and exact description, reference being had to the accompanying photographic illustration, making part of this specification.

This invention relates to a new and original design for carpets, oil-cloths, and similar fabrics.

It consists of the new arrangement and ornamentation of parts hereinafter more fully pointed out.

The accompanying photographic illustration represents a face view of my new design.

This design is composed of a series of figures, to be hereinafter more fully described, all arranged upon the background A, as shown in the photographic illustration. *a* is a **T**-shaped figure. It has a square placed in the angle of the **T**. A rhomboid is placed upon each of its horizontal arms. The stem is divided by a vertical division into two wings, between which a small rosette is placed. In each of the two corners formed by the stem and the top bar is a crown-shaped figure, *b*, with triangular base.

d is a rosette with ornamental center piece. From it project three trefoils, *e e e*, and a branched stem, *f*. The branches, as well as the stem *f*, have a flower at the terminus. Between two of the trefoils *e e* is a **V**-shaped figure, *g*, having the appearance of a thumb-nut placed on a stem, that traverses the rosette *d* and a smaller rosette beyond, as shown.

h i is a four-winged cross with a central rosette, and with projecting spear-heads between its wings.

j is an inverted-**T**-shaped figure with a rosette at the upper end of its stem, and *k* is a crown-shaped figure with flat base and richly ornamented top. *l* is a five-sided figure with two right angles and two oblique sides.

A large **T**-shaped figure, *m*, is placed near the rosette *d*. This figure *m* is embellished at each end of its cross-piece by a rosette, and also by an ornamental top piece. At each of the two corners, between the step and horizontal bar, is a right-angled sector.

n is a fan-shaped figure with an oval central ornamentation and two parallel stripes at its bottom.

The figures *k*, *h*, *l*, *m*, *n*, and *g* are all grouped along an irregular stem, *o*, having several branches, and connecting also to a floral ornament, *p*.

q is a prominent approximately **T**-shaped figure. The stem of this figure has a zigzag outline, giving the appearance somewhat of series of trapezoids. This figure has a large rosette at the junction of its stem to the cross-bar. From each of the two ends of this bar projects a bell-shaped ornament. A fan-shaped ornament surmounts the figure *q* at the center, entering a **V**-shaped recess formed in top of the cross-bar.

Between the figures *n* and *q* is a small rectangular figure, *r*, with ornamental top piece.

s is a rosette with three leaf-like projections.

t is a triangular figure with scalloped base. Upon the apex of this figure rests an **L**-shaped ornament, as shown.

u is a small **V**-shaped figure, richly ornamented and placed beneath the rosette *s*.

v w are two series of overlapping triangles, forming two converging rows.

x is a Maltese cross. Three of its sides are ornamented by a scalloped border. From the fourth side projects a stem, to which are connected, first, a series of superposed triangles, *y;* secondly, a figure looking somewhat like an ornamented coffee-mill, 1; and, thirdly, a roof-shaped figure, 2.

3 is a group of figures, which together form a triangular outline. This group is composed of a central rectangle, sidewardly-projecting triangular wings, a crown-shaped top, and two small triangular ornaments at the sides of the crown.

4 is a spider-like figure, having six legs, head and tail.

5 is another group of superposed triangles, and 6 is an ornamental bar, with leaves projecting from its lower side and joining to the **L**-shaped top of the ornament *t*.

7 is a rosette placed between the ornament *w* and an **H**-shaped figure, 8.

The figures constituting the above-described design are connected by bars and smaller ornaments to constitute one harmonious group.

I claim—

1. The design for a carpet, consisting of a divided stem, a horizontal bar, two rhomboids, a square, and a rosette, all arranged to constitute the **T**-shaped figure *a*, substantially as shown.

2. The design for a carpet, consisting of the **T**-shaped figure *a* and the crown-shaped figures *b*, substantially as shown.

3. The design for a carpet, consisting of a rosette, *d*, trefoils *e*, and branched stem *f*, all arranged to form a group, substantially as shown.

4. The design for a carpet, consisting of the figures *d*, *e*, and *f*, and of the figures *g*, substantially as shown.

5. The design for a carpet, consisting of a four-winged cross, central rosette, and spear-heads, all grouped to constitute the figures *h i*, substantially as shown.

6. The design for a carpet, consisting of an inverted-**T**-shaped figure, *j*, a rosette, and a flat-based crown-shaped figure, *k*, substantially as shown.

7. The design for a carpet, consisting of a stem, cross-bar, top rosettes, ornamental top piece, and right-angled sectors to constitute the **T**-shaped figure *m*, with the sectors in the angles, substantially as shown.

8. The design for a carpet, consisting of a fan-shaped figure, *n*, an oval central ornamentation, and two parallel stripes, substantially as shown.

9. The design for a carpet, consisting of the figures *k*, *h*, *l*, *m*, *n*, *g*, and *o*, substantially as shown.

10. The design for a carpet, consisting of a series of trapezoids, a

t is a triangular figure with scalloped base. Upon the apex of this figure rests an **L**-shaped ornament, as shown.

u is a small **V**-shaped figure, richly ornamented and placed beneath the rosette *s*.

v w are two series of overlapping triangles, forming two converging rows.

x is a Maltese cross. Three of its sides are ornamented by a scalloped border. From the fourth side projects a stem, to which are connected, first, a series of superposed triangles, *y*; secondly, a figure looking somewhat like an ornamented coffee-mill, 1; and, thirdly, a roof-shaped figure, 2.

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6. The design for a carpet, consisting of an inverted-**T**-shaped figure, *j*, a rosette, and a tri-based crown-shaped figure, *k*, substantially as shown.

7. The design for a carpet, consisting of a stem, cross-bar, top rosette, ornamental top piece, and right-angled sectors to constitute the **T**-shaped figure *m*, with the sectors in the angles, substantially as shown.

8. The design for a carpet, consisting of a fan-shaped figure, *n*, an oval central ornamentation, and two parallel stripes, substantially as shown.

9. The design for a carpet, consisting of the figures *k*, *h*, *l*, *m*, *n*, *g*, and *o*, substantially as shown.

10. The design for a carpet, consisting of a series of trapezoids, a

DESIGN.

W. L. JACOBS.

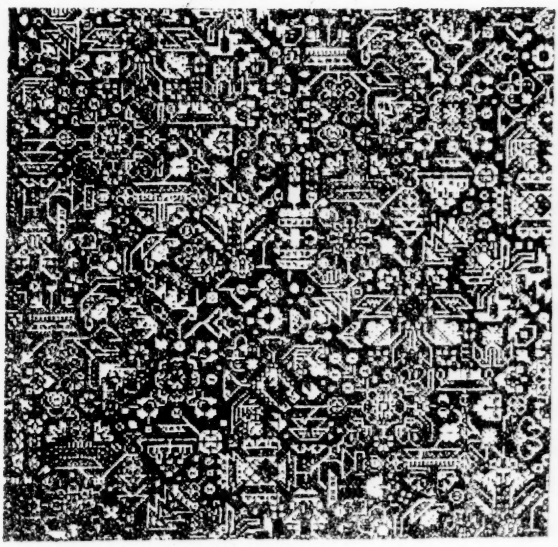
Carpet.

No. 11,074. Patented Mar. 18, 1879.

No 221.
Lowell Mass
to
Bonnell Carpet Co

pp. 71.

A



Witnesses:
John C. Tunbridge
Willy J. & Schlitz

Inventor:
W. L. Jacobs
by his attorney
A. W. Briesen

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rosette, and two bell-shaped figures to constitute the figure *q*, substantially as shown.

11. The design for a carpet, consisting of the figure *q* and a fan-shaped figure, the latter figure entering a **V**-shaped recess that is formed in the top bar of the figure *q*, substantially as shown.

12. The design for a carpet, consisting of the rectangular figure *r* and ornamented top piece, substantially as shown.

13. The design for a carpet, consisting of the triangular figure *t* and of an **L**-shaped ornament on the apex of the figure *t*, substantially as shown.

14. The design for a carpet, consisting of the Maltese cross *x*, a scalloped border, the ornament 1, and a roof-shaped figure, 2, all connected to form a group, substantially as shown.

15. The design for a carpet, consisting of a central rectangle, triangular wings, a crown-shaped top, and two small triangles to form the group 3, having triangular outline, substantially as shown.

16. The design for a carpet, consisting of the spider-like ornament 4, having legs, head, and tail, substantially as shown.

17. The design for a carpet, consisting of an ornamental bar, 6, and leaves, all connected to form a group, substantially as shown.

18. The design for a carpet, consisting of the ornamental figures 7 and 8, substantially as shown.

19. The design for a carpet, consisting of the figures *a*, *b*, *d*, *e*, *f*, *g*, *h*, *i*, *j*, *k*, *l*, *m*, *n*, *o*, *p*, *q*, *r*, *s*, *t*, *u*, *v*, *w*, *x*, *y*, 1, 2, 3, 4, 5, 6, 7, and 8, substantially as shown.

WINTHROP L. JACOBS.

Witnesses:
WILLIAM FOWLER.
FERRIER J. MARTIN.

(Here follows diagram, marked p. 21.)

22 United States Circuit Court, Eastern District of Pennsylvania.

THE BIGELOW CARPET COMPANY *vs.* J. & J. DOBSON. } In Equity.

THE SAME *vs.* THE SAME. } In Equity.

THE HARTFORD CARPET COMPANY *vs.* THE SAME. } In Equity.

NEW YORK, *June* 3, 1880.

Testimony taken by consent of counsel in the city of New York, at the office of A. v. Briesen, complainants' solicitor, for use before the master who has been appointed by this court to assess and re-

port the damages and profits, as more fully appears by the decrees filed in said several suits.

The testimony is taken in pursuance of notice.

Appearances: A. v. Briesen, Esq., for complainants; Geo. E. Buckley, Esq., for defendants.

It is agreed that the testimony here taken be taken before a stenographer, and that when written out and signed it be handed to the
23 master, and that it constitute a part of the proofs, which are submitted to the master for his determination of the questions submitted to him.

Counsel for complainants distinctly states, that for the purpose of saving time he intends to take proof in all three of the above-mentioned cases at one and the same time, instead of taking separate proofs for each of said suits.

WILLIAM JAMES, a witness, called on behalf of complainants, being duly sworn, deposes and says, in answer to questions propounded by A. v. Briesen, Esq.:

My name is William James; my age 42; my residence 41 Commerce street, New York city; my occupation carpet salesman in connection with W. & J. Sloane, 655 Broadway; I have been in the business 30 years; I am thoroughly acquainted with the different kinds and grades of carpet in the market, and am familiar with the prices and values of the different grades of carpets.

Q. 1. I now show you a piece of the Bigelow Company's goods marked 2,092, Indian body, and ask you whether you know this pattern in the market; if so, pray tell us what you know about it as to the extent of sale and as to the favor it found in the market.

(Objected to, as immaterial unless it relates exclusively to the sales by the defendants.)

Counsel for complainant states that he is trying to prove damage done the complainant.

Counsel for defendants objects to all testimony tending to prove damage done to the complainant, and all testimony except that which relates to the profits made by the defendants.

Complainants' counsel: On what ground does counsel for defendants make that objection; does the decree in each of the foregoing suits require the master to report the damage suffered by the complainants?

Defendants' counsel: On the ground that the decisions in the various circuit courts, upheld by the Supreme Court of the United States, have been that the complainants' damage in such cases as these shall be the amounts of profits made by the defendants through their infringement.

24 A. I know the quantity of goods sold of this pattern has been immense; since these carpets were made it decreased by the inferior quality of the goods.

Q. 2. I now show you Exhibit No. 2, which has been decided a counterfeit of the 2092 pattern, and ask you how sales of such imitation have affected the sales of the genuine Bigelow goods just referred to?

A. The style so nearly imitating it depresses the sales one-half of the original production, which it would have sold had not the copy been made.

(Defendants' counsel objects to this line of testimony, as going to prove indirect damage.)

Q. 3. Have you seen the Dobson counterfeit of the 2092 pattern?

A. Yes, sir.

Q. 4. How did they compare in quality with the genuine?

A. Very much inferior.

Q. 5. Inferior to what?

A. To the quality of the 2092.

Q. 6. Of the genuine Bigelow Company's carpets?

A. Yes, sir.

(Question and answer objected to by defendants' counsel, as before.)

Q. 7. At what figure are the genuine Bigelow goods sold in the market, if you know?

(Same objection as before.)

A. $1.85 per yard.

Q. 8. And at what rate were the Dobson counterfeit goods sold, if you know?

(Same objection as before.)

A. $1.65, and as low as $1.50.

(Counsel for complainants, in order to relieve counsel for defendants of his chronic objectionable condition, is willing to have it on record that every question which he will put to any one of the witnesses in this matter shall be regarded as objected to, on the reasons already stated, or any other reason that counsel for defendants may at any time suggest.)

Q. 9. Do you know anything about this design of carpet? (Showing witness a carpet copied from design of patent No. 10870, upon which the second one of these suits is based.)

A. The sale of that is similar to 792 D, not quite so extensive.

Q. 10. Who brought out that design, if you know?

A. It was brought out by the Bigelow Carpet Company.

Q. 11. And it ranged in price the same as the other, $1.85?

A. $1.85.

Q. 12. Did you notice any counterfeits of that in the market?

A. Yes, sir.

Q. 13. By Dobson & Dobson?

A. Yes, sir.

Q. 14. How did the introduction of these counterfeits affect the sale of the genuine?

A. Similar to other patterns.

Q. 15. You mean to reduce the sale?

A. Yes, sir.

Q. 16. Now, as a practical salesman, Mr. James, I ask you this question: If a costly carpet of a particular design is put upon the market, and afterwards the design is completely counterfeited by another house in inferior goods, what is the effect upon the ordinary consumption of the introduction of such counterfeits?

A. The copy is very injurious to the sale of the pattern at the low price, and the consumer is injured by the quality of the goods he buys.

Q. 17. Well, the genuine manufacturer—how is he injured?

A. Well, he is injured the same way as the dealers are from the stoppage of sales.

Q. 18. Do ordinary purchasers know the difference in the grade of carpets?

A. Very few; not the general buyer.

Q. 19. As a rule, they look at the design?

A. Not the quality.

Q. 20. If it is Brussels body, they take it to be all alike?

A. Yes, sir.

26 Q. 21. Can you give an estimate as to the proportion of sale which the Bigelow Company has lost in these two carpets, about which you have already testified, by the infringement of Dobson?

A. I should think, certainly, from three to four hundred pieces of each kind in a year.

Q. 22. What would have been the prospect of the continued sale for years to come of these designs, if it had not been for the infringement?

A. It would have stayed in the market as long as such patterns could be sold.

Q. 23. Now, Mr. James, I would like to show you a piece of the Hartford Company's goods (showing witness a piece of the Hartford Company's goods made in accordance with the letters patent under which their suit above mentioned is brought) and ask you whether you have seen this carpet known in the market as 11619.

(Complainants' counsel states that this carpet referred to is a carpet made under patent 11074, under which said suit of the Hartford Company is brought.)

A. Yes, sir.

Q. 24. How are carpets of this kind sold in the market, if you know?

A. At $1.75.

Q. 25. I now show you an imitation of said design made by defendants herein, and ask you how it compares with the genuine in quality?

A. Well, the fabric is very much inferior; the pattern drawn, very similar.

Q. 26. Precisely the same, is it not?

A. The purchaser would not know the difference except they were pretty well posted.

Q. 27. Experts as to the grade?

A. Yes, sir.

Q. 28. They could not tell the difference from the design?

A. No, sir; the goods are inferior.

Q. 29. How would you rate the Dobson imitation?

A. About $1.50.

Q. 30. Do you know whether the sale of the genuine Hart-
27 ford goods of the kind now referred to has been injured by the imitation?

A. Yes, sir.

Q. 31. Can you estimate the extent, about?

A. At least one-half what they would have been if the copy had not been made.

Q. 32. State whether or not the Bigelow Company would have sold all the carpets which Dobson & Dobson sold in imitation of the designs about which you have testified, and whether or not the Hartford Company would have sold all the pieces sold by Dobson & Dobson that they have made in imitation of the Hartford Company's carpets about which you have testified, had it not been for the infringement.

A. These patterns would have for future years sold in immense quantities every season; such patterns would never leave the market if imitations were not made.

Q. 33. I ask you whether the Bigelow Company would have sold to the persons who bought the infringing goods the genuine goods if the purchasers had not found the infringing goods in the market.

A. Certainly, sir.

Q. 34. And likewise the Hartford Company would have sold theirs had it not been for the infringing company?

A. Yes, sir.

Q. 35. How do you account for that; parties ask for the picture, and they buy wherever they can find it?

A. Yes, sir.

Q. 36. And buy where they can get it at the lowest price?

A. Yes, sir.

Q. 37. And, therefore, if there is no imitation in the market, the genuine would have sold?

A. Always.

Cross-examination *de bene esse*:

Q. 38. How long have you been a salesman in the carpet business?

A. I have been in the carpet business for thirty years; I have been at R. N. Tinson & Co., and Stewart's and Sloane's.

Q. 39. How do you know that upon every occasion that Dobson sold a piece of the infringing goods that the Bigelow Com-
28 pany or the Hartford Company would have sold a piece of that particular pattern if Dobson had not sold it?

A. We know by the buyers who have seen the carpet at the lower rates seeing the inferior goods would be apt to be taken by the price.

Q. 40. Do not customers frequently come into carpet stores with the intention of purchasing carpets for their rooms or dwellings, and desire to be shown various patterns which are on exhibition there, and then pick out that pattern which pleases them most?

Counsel for complainant submits that the question is to an extent misleading, unless the gentleman will distinguish between a retail customer who buys for his own use and a tradesman who buys to sell.

Q. 41. I refer to a retail customer.

A. They would be usually shown patterns to the taste of the customer; they suit themselves as to the design, what style and pattern they want, or to match certain decorations.

Q. 42. When retail customers come into your store you frequently have to show them half a dozen different designs?

A. Sometimes three or four hundred designs before they are completely suited.

Q. 43. By Mr. BRIESEN: Was that the experience also when you showed the 2092 D Indian body?

A. Yes, sir; when showing goods to customers we showed three or four hundred until they got suited.

Q. 44. When jobbers come to your store or to your salesroom to purchase carpets by the piece, to be by them again sold, do they not come and ask to see your various patterns, and pick out that which pleases them most?

A. Yes, sir.

Q. 45. Then, why are you able to say that upon every occasion where the Dobsons sold either a piece or a number of yards of this infringing carpet, that the Bigelow Company would have sold a duplicate of that pattern if Dobson had not made such sale?

(Objected to, as already answered.)

A. The sales would be as much again if the copy had not been made, and all such copies are against the original.

29 Q. 46. Do you not consider it likely, in view of the fact that both retail customers and jobbers come into a store and ask to have the various designs shown them, and then select those that please them most, that in more instances than you can estimate such jobber or customer would have selected some other attractive design had they not seen the infringing design in the defendants' stores?

(Objected to, as argumentative.)

A. These confined patterns are not seen everywhere, and evidently the buyer would buy the pattern at the original place; these patterns are confined to the Bigelow Company; we consider these the leading patterns in the market.

Q. 47. From your experience as a salesman, do you not consider

that in more instances than you can tell or estimate, if these infringing designs had not been in the defendants' stores, retail customers and jobbers coming into their stores to purchase would have taken some other attractive design where they have taken this?

(Objected to by complainants' counsel as assuming that which is not a fact:

1st. Because the fact is, the consumers did take the infringing design.

2d. Because the witness cannot know what design they would have taken if the infringing design had not been shown.)

A. Or, in other words, where parties are shown different patterns, this is their choice, their taste; being patterns that are considered choice, they take those, and the salesman's influence is sometimes regarded a good deal in such patterns; being choice designs, they are pressed sometimes.

(Question repeated.)

A. There are other designs which they could have purchased; of course it is not everybody's taste; some like one particular color, some like another; very often a salesman shows those which are selling and are the most attractive patterns.

Q. 48. Can you swear positively that for every ten pieces of infringing design sold by the defendant, the Bigelow Company would have sold ten pieces of their patented corresponding design if the defendants had not so sold said ten pieces of the infringing design?

A. They would have sold them if the copy had not been made.

Q. 49. How do you know they would?

A. By the Bigelow Carpet Company owning the right of the patent, which prevents other stores having the same design.

Q. 50. Then you are able to swear, are you, that every retail customer and jobber who purchased of the defendants came to the defendants' store for those particular infringing designs and for no others, are you?

(Objected to, as immaterial and assuming what the witness has not stated.)

A. Yes, sir.

Q. 51. You are able to swear that?

A. Yes, sir.

Q. 52. Are you acquainted with every retail customer who came into the defendants' store?

A. No, sir; I would have to have a long memory.

Q. 53. Have you met every retail purchaser and jobber who purchased the infringing design of the defendants?

A. No, sir.

Q. 54. Have you been in communication with them?

A. No, sir.

Q. 55. How are you able to say that they came to the defendants' store to purchase the infringing design and no other?

A. By what views we have taken from the customers themselves;

we have never taken the names of the parties; they looked at the original and then bought the copy; they stated they had seen a copy of the original pattern at Dobson's.

Q. 56. Am I correct in understanding you to say that every customer, whether retail or jobber, who purchased infringing designs of Dobson first come to your store and saw the original, and then went and purchased of Dobson a carpet?

A. No, sir; not having taken the names of the parties who had seen the carpet; they stated they could purchase the same thing at lower prices.

31 Q. 57. Have you seen all these retail customers and jobbers who bought at Dobson's the infringing pattern?

A. I have not seen them myself, but I have heard them spoken of; I don't wait on everybody, but I wait on a great number.

Q. 58. Then your testimony is from hearsay, what you have been told?

A. Yes, sir; I have heard it spoken of, and also I have spoken to customers myself.

Q. 59. Please name the individual or individuals who told you that customers first went to your store and saw the original and then went to Dobson's?

A. I never made the inquiry of those names.

Q. 60. But you say you were told that that was the case; I ask you to tell who told you so?

A. The trade.

Q. 61. Name one gentlemen in the trade who told you so, that every customer did that?

A. Not every customer; I said I did not know the individuals who came there to the store to look at the carpets, who bought these patterns; I state now I do not know the names of the parties who had seen the carpet.

Q. 62. You say not every customer?

A. Not every customer.

Q. 63. How many customers?

A. I could not tell you; I have never taken any minute of it.

Q. 64. You don't know how many?

A. No, sir.

Q. 65. How much inferior is the defendants' carpet to the Bigelow and Hartford Company's carpet?

A. Very much inferior; I should think its value from 25 to 30 per cent. inferior.

Q. 66. Do you state this upon hearsay?

A. No; from personal knowledge, and from the number of years I have been in the business, very much inferior.

Q. 67. When did you come to that conclusion?

A. Long before the defendants sold goods in New York.

Q. 68. Then that estimate is based upon your general knowledge of the carpets which they sold?

32 A. General knowledge, knowing the quality and the sale of them by defendants.

Q. 69. How long did this interference of the defendants with your sales occur with respect to the pagoda pattern No. 2092?

(Objected to, as the witness has not testified that the infringement interfered with his sale, and as he is not connected with either one of the complainants; question withdrawn.)

Q. 70. How long did the sales by defendants of the infringing pagoda pattern interfere with the sales by the Bigelow Company of that same pattern, their number being 2092?

(Objected to, as not cross-examination.)

A. I could not state the time.

Q. 71. You don't know?

A. No, sir.

Q. 72. How long did their sales of the infringing design patent 10870 interfere with the sales by the Bigelow Co. of the same design?

A. I could not state the time.

Q. 73. Do you know how much of it the defendant sold?

A. No, sir.

Q. 74. What do you mean by answering, in your direct examination that you know the Bigelow Company lost sales of from three to four hundred pieces a year?

A. By having the copy on the market, it depreciated the sale of the original.

Q. 75. You just infer that that would be the case?

A. I know it is so; I do not infer anything about it, by my personal showing, myself.

Q. 76. Please state the means by which you arrive at that positive conclusion; you admit that you do not know how much the defendants have sold.

A. I have no record of their books, not knowing their amount of sales; but I know the depreciation of the original pattern is the amount I have stated; had not the copy been made the original would have been continuously sold and still selling; the sales would have gone on as they usually did.

33 Q. 77. How do you know they would?

A. From personal showing; my own knowledge of what I have shown of the pattern myself.

Q. 78. Don't you know that the sales of designs vary with different seasons?

A. Such patterns are sold in all seasons.

Q. 79. Don't you know that the taste for a certain design, and the sales in the market, vary; sometimes sales will almost entirely cease?

A. Not of such designs as these; they are unceasing; marketable at all times—any season of the year.

Q. 80. Do the Bigelow and Hartford Companies have certain customers who take a specified number of pieces of these patented designs at regular intervals?

(Objected to, as calling for hearsay.)

A. They would have if the copies had not been made; of course it leaves the pattern open for the dealer to buy where it suits him the best.

Q. 81. Have you examined the books of the Bigelow and Hartford Companies?

A. No, sir.

Q. 82. Do you know how many pieces of these various patented designs, upon which suit has been brought, they have sold?

A. I know the depreciation of the sales.

Q. 83. I ask if you know the number of pieces they have sold?

A. No, sir.

Q. 84. Do you know the number of pieces they are now selling?

A. No, sir.

Q. 85. How do you know the Bigelow Company or the Hartford Company have lost sales at all on this thing?

A. By not having call for the pattern, of course it has ceased selling on account of the copy being made by the other house; it depreciates their sale and stops the making of them.

34 Redirect examination:

Q. 86. In what respect, Mr. James, are the defendants' goods inferior to the complainants; in character of the material employed, or what?

A. In the character of the material that is used in them.

Q. 87. In what respect is one Brussels carpet superior to another Brussels carpet in the time it would wear?

A. Its the service, the number of years it would last.

Q. 88. What is your experience as to the ordinary wear of the genuine patented carpets about which you have testified; I mean how long do they usually last when exposed to ordinary use?

A. In ordinary use a Bigelow would wear ten years, where the other would not last four.

Q. 89. The Dobson would last about four and the genuine would last about ten years?

A. Yes; that has been tested by actual wear of hotels and steamboats; that is the proper wear that a carpet would get of that kind.

Q. 90. These patterns about which you have testified were regarded as leading patterns in the market?

A. Yes, sir.

Q. 91 That is why you say their sale would not deteriorate unless it was for the production of copies?

A. Yes, sir.

Q. 92. Now, of course, the fact of the copy has not, or has it, the principal injurious influence, as the mere fact of there being a copy for sale at a lower price?

(Objected to as leading.)

A. No, sir.

Q. 93. Have you yourself personal knowledge of people declining to buy these genuine goods of your house because of the existence of the infringing pattern at a lesser price?

A. They always declined the price of the original, as they could get the copy so much cheaper.

Q. 94. Have you any interest in any of these controversies, direct or indirect?

A. No, sir; none, whatever.

35 Recross examination:

Q. 95. You say these designs are all leading designs?

A. Yes, and very popular.

Q. 96. Are there more of them sold than of other designs?

A. There are other designs that take well, but these are picked out by the customers' own taste; it is not the taste of the salesman, or anybody else but the consumer.

Q. 97. How many leading designs are there in the market?

A. That would be a hard matter for me to tell.

Q. 98. Are there fifty?

A. Oh, yes; I could not name the number of them.

Q. 99. I suppose there are more than three or four hundred leading designs in the market?

A. I could not state the number at all.

Q. 100. It would be impossible to estimate the number of leading designs, would it?

A. Yes, sir.

Q. 101. But these are among them, are they not?

A. These are among the collection.

Q. 102. Have you not heard complaints from customers from time to time, that various of these Bigelow and Hartford carpets, not those involved in these suits, are more expensive than Brussels carpets sold elsewhere?

(Objected to as not relating to any issue in these causes:)

A. Do you mean as to price?

Q. 103. Yes.

A. The price of the Bigelow and Hartford are always high standards.

Q. 104. Then you have heard such remarks by customers, have you not?

A. No, sir; nothing more than speaking of their value, quality, and goodness of fabric, as being the best.

Q. 105. But you have heard customers say that they can purchase body Brussels carpet cheaper at the defendants' than they could at your store with respect to all designs?

A. Yes, sir; applied to all grades of goods that they keep.

Q. 106. Where did you see one of the Dobson body Brussels carpets in use for four years?

36 A. I stated the relative wear of the carpets; it was my opinion of the wear of the different grades.

Q. 107. As merely your opinion?

A. Yes, sir.

Q. 108. You don't know of any actual facts having borne that out?

A. I could not name that; that is my opinion as to the wear of the two carpets.

Q. 109. You are engaged in selling Bigelow and Hartford Company carpets, are you not?

A. I sell all kinds, all grades of goods; not these especially.

Q. 110. You don't sell the defendants' carpets, do you?

A. No, sir.

Q. 111. There is a general prejudice among carpet jobbers here against the defendants, is there not, on account of their selling low-priced goods?

A. Selling inferior goods

Q. 112. Well, there is that prejudice?

A. Yes; and there always will be as long as they make such grades.

By Mr. BRIESEN:

Q. 113. What is the reputation of the defendants as regards honesty in dealing with competitors; I mean as to their getting up their own designs or not?

A. The feeling is that copies are extensively made from original designs.

Q. 114. Is that regarded as an honest practice?

A. No, sir; a very dishonest one.

Q. 115. Is it or not their general practice to copy other people's designs?

A. Yes, sir.

By Mr. BUCKLEY:

Q. 116. How many cases do you know of where they have copied other peoples' designs?

A. I could not mention them; these two particular cases I know something about; if any others were shown to me I should be able to testify the same as I do in this case.

37 Q. 117. Can you pout out any single instance where they did it before?

A. I could any other patterns if I saw them.

WILLIAM JAMES.

Sworn to before me, this 3d day of June, 1880.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

DAVID M. READ, called by the complainants, being duly sworn deposes and says, in answer to questions propounded by complainants' counsel: My name is David M. Read; I am 47 years of age; I reside in Bridgeport, Conn., and am in the dry goods and carpet manufacturing business.

Q. 1. Have you been present while Mr. James, the last preceding witness, gave his testimony?

A. A part of the time.

Q. 2. Does what you heard of his testimony agree with your knowledge and opinions?

(Objected to, as general.)

A. I am not conversant with all that he said; as far as I know it is correct.

Q. 3. You have seen the pagoda pattern, 2092, of the Bigelow Company in the market, have you not?

A. Yes, sir.

Q. 4. You have seen the Dobson imitation thereof?

A. I have.

Q. 5. How does it compare in quality of material with the genuine?

A. I am not a manufacturer of Brussels carpets, and perhaps not competent to give the exact difference; it is inferior.

Q. 6. But it is inferior?

A. Yes; in my judgment.

Q. 7. Have you seen the genuine Bigelow pattern known as 2134 in the market?

A. Yes, sir; I have.

38 Q. 8. Also the copies thereof made by the Dobsons, like the pieces now shown you?

A. No, sir.

Q. 9. Please look at the Dobsons' piece, which I now show you, which is made in imitation of the genuine, and state how the two compare in grade and quality.

A. The Dobson is very much inferior; lighter in weight.

Q. 10. Have you seen the genuine Hartford carpet, about which Mr. James has testified, and the imitation thereof by Dobson?

(Pieces of carpet shown witness.)

A. Yes, sir; I have seen both.

Q. 11. How do they compare in quality?

A. The Dobson is inferior in quality, in my judgment.

Q. 12. As a practical dealer in carpets, what is the effect upon the sales of genuine goods when copies thereof or counterfeits are introduced at a lesser price?

A. It is to injure the sale of the original design.

Q. 13. How do you account for that?

A. In the first place, the trade will, to a very large extent, go after the inferior article, because they can buy it cheaper, and the manufacturer of the original and better goods suffers thereby very largely, because he has had great expense if he has got out a leading design for the market, a taking pattern, and another manufacturer puts upon the market an inferior copy of the same design, it hurts the sale of his goods with the better class, on account of its being an inferior goods, and with another class it takes the place, because they can buy it cheaper, thereby, in most all cases within my knowledge, it destroys pretty much the sale of the first original design.

Q. 14. The designs which you have been shown and which are involved in these three suits here, are they or not leading designs?

A. They are; at least two of them that I know, No. 2092, and this of the Hartford; the other I cannot speak of, I do not know; in my judgment, two of the best things that have been put upon market in years.

Q. 15. Even if the defendants had sold but very few of the infringing goods, did or did not, in your opinion, the complainants lose a much larger proportion of trade?

39 A. I don't quite understand that question.

Q. 16. Suppose the Dobsons had simply made ten pieces of the infringing goods, but offered them to the trade at a lower price than the genuine; would the injury done the complainants merely have been the existence of those ten pieces, or would they lose a larger proportion of sale on such leading goods as these than ten pieces?

A. It would be very much more damage, in my judgment, than just the sale of the ten pieces.

Q. 17. The damage would be proportionate to the reduction of actual sale as compared with previous sales, would it not?

(Objected to, as leading and as calling for the witness' inferences instead of a statement of fact.)

A. The infringement and copying of a new and popular pattern would, in my judgment, damage the sale very largely.

Q. 18. And in proportion, for the first season, to the falling off of the sale?

A. It would affect it very largely, although the sale of the inferior goods might not be large.

Q. 19. Have you any idea as to the price at which these genuine goods are offered in the market?

A. Yes, sir.

Q. 20. What is the price per yard?

A. $1.65, I believe, at wholesale, and they have been retailed at $1.85 in the city here, I think, and in some places as high as $2.

Q. 21. Have you any idea as to the price at which Dobson offers these infringed goods in the market?

A. Their price, I think, is $1.50.

Q. 22. Wholesale?

A. Wholesale.

Q. 23. And how much retail?

A. I don't know what their retail price is at present.

Q. 24. Would, in your belief or opinion, the complainants have sold of the genuine goods as much as the defendants sold of the infringing goods had the defendants not been in the market with such goods?

A. It would be my opinion that they would have done.

Q. 25. Have you had experience with counterfeiters of your

40 own designs; if so, please state the effect of such counterfeiting upon the sales of genuine goods?

A. I have put an original pattern upon the market, where it proved to be a good pattern, and had it copied by another party, and sold for a lower price, and the way I discovered it was the fall-

ing off in the sale of my own goods, and looked it up and found that was the case; another party had made it, and had almost stopped the sale of the original design, which was my own.

Q. 26. What do you know to be about the expense of putting a new popular design upon the market, including the pay of draughtsmen, change of loom, cutting of cards, and introducing generally the new design?

A. The cost of a design like this one is not confined to the cost of the labor upon that one design; for instance, the Bigelow Company may keep a corps of designers employed for six months, and in that entire six months they may not produce over two designs of the reputation of that one, and in the meantime the expenses are going on and are really chargeable, perhaps the whole six months' labor, to a very few good permanent designs; that is my experience.

Q. 27. Are you at all able to estimate as to the average cost, then, of getting up a popular design?

A. No, sir.

Cross-examined by Mr. BUCKLEY:

Q. 28. You say six months' labor of a designer would result in the production of only two such popular designs as these; he would in the meantime be getting up a number of less important designs, which would be used by the company employing him, would he not?

A. Yes, sir; I say a corps of designers might labor for six months; it is on the principle of mining—they may be delving in hills, but they don't strike a nugget only once in a while; therefore the whole labor is chargeable to that one nugget; those are the chances we take in designing.

Q. 29. The corps of designers, however, would be turning out designs continuously, would they not?

A. Yes; but it is on the principle of throwing out the ore that won't hardly pay for the working until you strike a good vein,
41 but they are not worth—I presume any of our leading manufacturers would testify, the defendants or any other—that the great bulk of designs turned out would be of not so very much value; it is the choice one that they strike once in a while.

Q. 30. It depends a great deal upon the ability of the designers employed, does it not, more or less?

A. Of course they have got to have designers of ability to get anything that is good.

Q. 31. The Hartford Company are continually putting new designs upon the market, are they not, as well as the Bigelow?

A. Yes; I suppose they are.

Q. 32. You speak of charging the falling off of sales of the original designs during the first season to the sale of inferior infringing designs; would you also attribute the difference between the first sales and those of the second season to the same cause; why might that not be due to other causes?

A. Well, it might be due to other causes.

Q. 33. Might not the falling off in the sales of the first season be due to other causes, combined with this?

A. Hardly probable.

Q. 34. Well, it is possible, then?

A. Hardly.

Q. 35. Did you ever know of a good design running only part of a season?

A. No, sir; not unless it was infringed upon.

Q. 36. Well, in one season the sales vary, do they not, in different parts of the season, the amount of the sales?

A. In one year?

Q. 37. You call a season a year?

A. No; the spring and fall is the season for carpets; the heat of the season is about three months each, perhaps.

Q. 38. Well, the sales of one month vary from those of another in one season?

A. Not to any great extent.

Q. 39. Did you ever buy any of these infringing goods of Dobsons?

A. No, sir.

Q. 40. How do you come to know the price at which they sell these infringing goods?

A. From my knowledge of the market, as a dealer and
42 manufacturer; I have bought their goods this season, but not these.

Q. 41. What enables you to form an opinion as to the sales of infringing goods by Dobsons, exactly supplementing the sales of the original patented goods by the complainant?

A. From the fact that these patterns were very prominent and selling very largely by these parties, to my knowledge, at the time that defendants copied them. Then I know from hearsay that the sale was very much decreased, and I judge that the Bigelow and Hartford Company would have sold their good, having the start they did in the market—as many goods and more than Dodson and they sold together; that is my opinion from my knowledge of the market. I am in the market every week, and in at all of these places.

Q. 42. Still that is merely an opinion of yours, and you cannot swear positively that it would have been so?

A. No, sir.

DAVID M. READ.

Sworn to before me this 3d day of June, 1880.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

JOHN H. WORTH, called on behalf of complainants, being duly sworn, deposes and says, in answer to questions propounded by Mr. BRIESEN:

My name is John H. Worth; I am 53 years of age; reside in West-

field, N. J., and my occupation is salesman of the Bigelow Carpet Company.

Q. 1. How long have you been with that company?

A. Going on eleven years.

Q. 2. You have personal knowledge of the sale by the complainants, the Bigelow Company, of the pagoda pattern known as No. 2092?

A. I have.

Q. 3. And of the Chinese lantern pattern known as No. 2134?

A. Yes, sir.

43 Q. 4. Did you notice the income of the infringing goods of said two designs when brought out by the defendants?

A. Yes; very soon afterwards.

Q. 5. Can you state to the court and to the master what effect the introduction of the infringing goods had upon the sale of the genuine goods?

A. It curtailed the sale of these patterns very much.

Q. 6. Can you tell us, with any degree of exactness, how it curtailed the sale of the pagoda pattern?

A. I can give you about the number of pieces we sold the first year and what we have been selling for the last six months. We sold 586 pieces the first year, and this last six months 132.

Q. 7. Then the falling off has been at the rate of 400 pieces?

A. About one-quarter.

Q. 8. That would be a loss of over 300 pieces per annum, would it not?

A. Yes, sir.

Q. 9. What has been the effect on the Chinese lantern pattern of infringement?

A. The first year we sold 100 pieces of that, and since that we have not been able to sell any; it stood still entirely.

Q. 10. Have you any on hand?

A. Yes; we have had it shown all this time, and we could not sell a piece.

Q. 11. Why?

A. The fact that they said they could buy it in inferior goods.

Q. 12. At a lower price?

A. Yes, sir.

Q. 13. Have you any direct knowledge to show that you were, and also failed to sell the pagoda pattern because of such infringement?

A. No, sir; I have not. I could not swear to that directly. Yes; I could, too, because we have not had the orders from the parties that controlled the pattern for it, and they have not been able to sell. Consequently we have not produced it.

Q. 14. And now I understand you that your loss by the infringement was about 300 pieces of pagoda and about 100 pieces of Chinese lantern?

A. I should say so. We have not been able to sell any of
44 the Chinese lantern this year. We have had it on show all the season.

Q. 15. Had it not been for this infringement, would you have been able to sell it?

A. As far as my knowledge and belief, we should have continued to sell that.

Q. 16. Would you have been able to sell as many pieces as the defendants did of these infringing goods, had they not been in the market?

A. I think we should have been able to sell more.

Q. 17. Certainly as many as they?

A. Yes; and more.

Q. 18. Are the defendants' goods equal to the genuine in grade?

A. They are not so considered.

Q. 19. How do you consider them?

A. They are neither as good material or as well manufactured as the genuine; it is so considered by all the trade.

Q. 20. How do you rate the difference in percentage?

A. I should think somewheres about 25 to 30 per cent.

Q. 21. The infringing goods are from 25 to 30 per cent. inferior in grade to the genuine?

A. Yes, sir.

Q. 22. Do you believe, then, as to the cost of manufacture the same difference, from 25 to 30 per cent., exists?

A. I should think nearly that; some may not be quite as much.

Q. 23. Can you give us an idea as to what it did cost to get up for the trade the pagoda design, including all the expenses of draughtsmen or artists, changing the loom and introducing the goods to the trade?

A. No; I don't know as I could exactly; I suppose from three to four hundred dollars; I think that would be a small estimate, if anything.

Q. 24. Likewise with the Chinese lantern pattern?

A. Yes; just about.

Q. 25. The loss of trade occasioned by this infringement required you to get up other patterns, so as to keep up the average of your sales, did it not?

A. Yes, sir.

45 Q. 26. How do you estimate the expense or damage put upon your business by that branch of the injury done you?

A. It is pretty hard work for me to form an estimate of that; I could not give an estimate of that because I am not clear.

Q. 27. About how many designs did you have to produce in order to make up for the loss occasioned?

A. We produce a great many designs that we get nothing from; of course these come in with the others; these that we do succeed on cost so much more, because we have this corps of designers and have to keep them at work; we make a great many designs that are just samples and are not used at all.

Q. 28. Can you give us an idea of about how many different designs because of these infringements taking your trade?

A. No; I could not state that, as we are constantly making out new designs all the while.

Q. 29. Do you think that an inspection of the books would assist you in finding out these facts?

A. It might some; I might by inspecting our books.

Q. 30. I would like you to ascertain if you can.

A. Yes.

Q. 31. The average number of pieces of each design that you start on, that is, actually put into the market—that is, for instance, supposing of one design you make 500 pieces, of another you only make 2 pieces, of another you make 10 pieces, the amount of those three lots would be 512, and dividing that by three would give the average cost—then you could arrive at what I am asking you.

A. Yes; I understand you.

Q. 32. So that we would see by the average how many designs you needed to replace these 400 pieces that you lost.

A. Yes.

Q. 33. And, as you said that the getting up of each design costs three or four hundred dollars, we would then get at the definite figure?

A. Some designs cost more than others; a large design like this costs more than a small design.

Adjourned for lunch.

46 After recess the examination of Mr. WORTH was continued as follows:

Q. 34. What, if anything, did you ascertain in regard to the matter last inquired for?

A. I ascertained that we had spent in the neighborhood of $1,000 on designs to supercede or take the place of the pagoda design.

Q. 35. Did you succeed?

A. No, sir; we have not succeeded.

Q. 36. Then you did not make up the loss occasioned you by the infringement, even at the expense of $1,000?

A. No, sir; this patent is a novel idea itself—the first thing of the kind brought out.

Q. 37. Did you ever have a pattern that took the market as well as the pagoda pattern in body Brussels?

A. I don't know but what we have in other styles, but not in this peculiar style.

Q. 38. It was one of the most successful patterns that has been brought out?

A. Yes, sir.

Q. 39. How did you seek to overcome the loss occasioned by the loss of the Chines lantern pattern?

A. There was no use; it just stopped the sale of it.

Q. 40. You stated, I think, that you had some of it left?

A. Yes; we have a few pieces left.

Q. 41. Did you try to sell them?

A. Yes, sir.

Q. 42. Did you succeed?

A. No, sir.

Q. 43. Could you not sell them?

A. Could not sell them at all.

Q. 44. Why not?

A. I don't know; because they depreciated by being made in cheaper goods at less price. I don't know what else.

Q. 45. Do you know whether or are you informed whether compromise was offered to the defendants, by which the payment to you of a certain sum of money was agreed upon by both parties, and the only condition insisted upon was that you should control the sale of the infringing goods at a price to be determined upon between you and the defendants?

A. I think there was something of that kind.

47 Q. 46. And the defendants refused to accept, because they did not want you to control the sales?

(Objected to, as leading the witness by argumentative discourse.)

Q. 47. What was the cause of the failure of the proposed compromise?

A. Because they would not let us control the goods they had in their hands of that pattern.

Cross-examined by Mr. BUCKLEY:

Q. 48. What was your offer of compromise?

A. They made a proposition of some kind. I have forgotten the details of it, but as I understand that was the point, the difference was—the way we could not agree—just on that one point.

Q. 49. You don't remember what the offer of compromise was at all, then?

A. No, sir; I don't remember the detalis of it all, the amounts, &c., only I know that was the reason we could not come to an understanding.

Q. 50. Was not part of the objection that you asked too much?

A. No, I think not; as I recollect about it, that was the only point.

Counsel for complainant states as a matter of fact, and that he is willing to testify as a witness on that point, that the sum of money on which the compromise was agreed was offered to him by Mr. Dobson and considered accepted at the time, and that the only cause of the failure of the compromise was that Mr. Dobson was unwilling to allow the complainants to sell infringing good- at any price named by those defendants.

Counsel for defendants is willing to be sworn and testify in his own behalf; also that there were several compromises, and that the only objection of the defendants, so far as regards the actual sale of the infringing goods, was that they should not be put up at public auction and sacrificed, but be sold at private sale, and also that the demand of the complainants by way of remuneration was too great.

48 Counsel for defendants objects to any statement by either counsel, or offer to testify, as not being proper testimony in this behalf, to bring up an issue on that question, viz., as to who should control the sale of the goods.

Q. 51. Did you ever hear any proposition made by the defendants in this case?

A. No, sir.

Q. 51½. Did you ever see a written communication from them making a proposition?

A. No; I don't think I ever did.

Q. 52. Then what you have stated as to their desire to control the sale of the goods is merely from hearsay, is it not?

A. Yes; it is statements made by Mr. Kendall to me.

(This testimony regarding compromise is objected to by counsel for defendant, as being based upon hearsay.)

Q. 53. In what period of time did you spend $1,000 in getting up new designs to supplant ot take the place of those which had been infringed?

A. I think it was about a year on that particular point.

Q. 54. How much more did you spend in getting up other designs during that same period?

(Objected to, as not at issue.)

A. I could not state that.

Q. 55. Did you spend any more?

A. We have a corps of designers at work all the time.

(Counsel for complainant now offers in evidence a letter written him by the defendant, and dated April 3, 1880, and the same is marked "Exhibit Def't's Letter of Compromise," and asks counsel for defendants to admit the genuineness of that letter.)

(Defendants' counsel admits the genuineness of the letter, but objects to its being placed in evidence, unless it is coupled with full testimony as to all the facts and negotiations out of which it arose.)

49 EXHIBIT DEFENDANTS' LETTER OF COMPROMISE. JUNE 3, 1880.

PHILAD'A, *April* 13, '80.

A. V. BRIESEN, 229 *Broadway, New York.*

DEAR SIR: We have your favor and note remarks. We have paid the contempt costs to-day. Neither bill or demand in any shape had been made on us until we got the notice from Mr. Fraley asking for attachment for same. Now, as to the settlement of these cases (3): We will give pou $900 as mentioned, and you take a decree in all the cases.

About the sale of the goods to the Bigelow Co. at $1.00 p. yd., we positively refuse to do it. This is so different from what we talked about, that, if coupled with the settlement, it cannot be complied with.

As stated, we will consent to have any legal restraint put on their sale, and will, if we should sell them, give a list of the parties to whom sold; and as their sale can in no way affect the Bigelow Co.

in any way, we feel that this is nothing but vindictiveness, which is unnecessary.

About the Hartford pattern, you have our report before the master. We have none of them on hand, or had when the injunction was taken. We also have none of the pagoda pattern on hand; we have not ascertained how many pieces we have made, but not many, if any, more that the Hartford pattern—about twenty pieces, but am not positive. We have gone as far as we can in these cases, so far as the settlements is concerned.

Yours, truly, JOHN & JAS. DOBSON.

Q. 56. Did you employ any new designers after you found your sale dropping off on the infringed patterns over and above the number which you had previously employed?

A. No, sir; we did not..

Q. 57. Did you pay these designers a regular salary?

A. Yes, sir; we keep them busy all the year round.

Q. 58. This $1,000 which you speak of was spent by way of salary?

50 A. Yes, sir.

Q. 59. To the designers?

A. To the designers.

Q. 60. You would have spent that $1,000 whether these infringements had occurred or not, would you not?

A. We might have spent it, but it would not have been in that particular field.

Q. 61. By saying the money was spent in this particular direction, you mean paid in the way of salary to these designers and getting up new designs?

A. Means in getting up new designs to succeed and take the place of this particular style.

Q. 62. Then you mean that you issued instructions to your designers to get up a design in this particular style?

A. Yes; of that style.

Q. 63. Of that general character?

A. Yes.

Q. 64. What is the business of these designers; what are their duties; to get up new designs?

A. Yes, sir.

Q. 65. How long do these designers work a day?

A. Commence at 9 and leave off at 5.

Q. 66. They are expected to be at their duty from 9 to 5 every day, are they not?

A. Except on Saturdays, they leave at two o'clock.

Q. 67. Did these designers get up any new designs of this general style?

A. They get up all styles; they have to have a variety of styles; they are not confined to this style; that is what I understand; we spent a thousand dollars in trying to get up something similar to this to take the place of it; we have been unable to do that—to get up anything to take the public as that did; that was the first one;

you might say it was a bonanza—just happened to take and please the public, and we have not accomplished the thing since.

Q. 68. It even pleased your counsel, I notice.

A. I am only stating the facts.

Q. 69. You say that the carpets of the defendants are 25 to 30 per cent. inferior to those of the complainants, or near that?

A. Somewheres in that neighborhood.

51 Q. 70. You mean the value of the material placed in them is so much inferior?

A. The material and manufacture, both.

Q. 71. When did you last have a design which ran approximately as well as the pagoda design?

A. We have got others of other styles that run, I suppose, equally as good; they are not this peculiar style; they are altogether different.

Q. 72. About how many have run as well as this?

A. Perhaps we may have four or five or half dozen; perhaps more; I don't think more; then we have a great many of lesser lights.

Q. 73. When did you first place this pagoda style upon the market, about?

A. I think it was in the spring of 1879—1879 or 1878; I have forgotten; in the fall of 1878.

Q. 74. Did you get up any other design that was placed in the market about that time?

A. Not of that character.

Q. 75. Which ran approximately as well as this?

(Objected to, as utterly immaterial.)

A. I don't recollect now whether we did or not; we are bringing out designs constantly, and once in awhile we get a bonanza, and then again we don't.

Q. 76. Do you not call to mind one design which you placed upon the market about that period, which ran about as well as this, which was not infringed?

A. No, I do not; we got up another in the same colors, but different style altogether; but that was infringed, but not by these parties, I think, but by other parties, I think; I guess Mr. Briesen has a suit on.

Q. 77. About how long did these that you have mentioned as running about as well as this sustain their large sale?

A. Well, we can't always tell that; sometimes they will run three years, and sometimes longer, sometimes not so long; we can't tell; we have got some carpets that we have made for ten years; they are not what we call large sales, like this, but we always sell them.

52 Q. 78. I suppose you occasionally have a design that sells very largely, and only runs for a season in large sales?

(Objected to.)

A. There is no popular design but what lasts more than a year.

Q. 79. I suppose some of them run only about 18 months or two years?

A. Some we don't even make after bringing them out; we have to throw all our labor and expense away; a great number we cannot tell, and those that are popular they bear the expense of the others; therefore when we do get a pattern that is popular it makes it cost us a little more than if all our patterns are popular.

Q. 80. That, I suppose, is the experience of all carpet manufacturers?

A. Yes; not only carpets, but all things that have to be made in that way.

JNO. H. WORTH.

Sworn to before me, this 3d day of June, 1880.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

53 WILLIAM FOWLER, called on behalf of complainants, being duly sworn, deposes and says in answer to questions put to him by complainants' counsel:

My name is William Fowler; I am 30 years of age; reside at Orange, N. J.; occupation, salesman for the Hartford Carpet Company.

Q. 1. Do you recognize the carpet on which this suit is brought, manufactured by the Hartford Carpet Company?

A. Yes, sir.

Q. 2. Do you know since when they have been in market?

A. The spring of 1879.

Q. 3. Can you state how the sales before the infringement commenced corresponded with the sales after the infringement?

A. We sold in the first six months about 800 pieces.

Q. 4. Of that design, 11074?

A. Yes, sir; we sold in the first six months a little over 800 pieces, and in the last twelve months about 375; I mean, up till the first day of July, 1879, we sold over 800 pieces; from the first day of July, 1879, to the first day of June, 1880, we sold 380 pieces actual sales.

Q. 5. According to the half year's sale, the annual sale would have been 1,600 pieces?

A. Yes, sir.

Q. 6. And by the infringement it dwindled down to 380 pieces?

A. Yes, sir.

Q. 7. According to that, your loss by the infringement would be 1,280 pieces per annum, would it not?

A. Yes, sir.

Q. 8. What do you consider to be the loss to the Hartford Carpet Company in one year in sales of said patented carpet by reason of said infringement?

A. Well, of course, the only way you can get at that is to take other patterns which have not been infringed, and you find they sell very much the second season as they did the first.

Q. 9. And in view of that, what do you consider to be the loss in this case, in the number of pieces?

54 A. If the carpet had not been infringed, undoubtedly we should have sold a very large quantity more of the goods.

Q. 10. How much larger do you think you would have sold, in view of the first six months' sale?

A. Well, I should think it was prefectly fair to say we—of course of this you can only judge from other patterns.

Q. 11. Taking that as a basis, what would be your computation for this?

A. We ought to sell in the second year certainly as much as we sold in the first six months, undoubtedly, I think.

Q. 12. Now, the first six months you sold 800 pieces?

A. Yes; a little over.

Q. 13. And in the second year you sold 380 pieces?

A. Yes, sir.

Q. 14. Now, please state what you think would be the loss, in number of pieces, by reason of the infringement.

A. About 400 pieces; that, of course, is based on the result of experience in selling other patterns. Of course you cannot tell exactly how any individual pattern will sell.

Q. 15. That is your most reasonable and sound estimate, is it not?

A. Certainly; that is the only way you can base it.

Q. 16. Now, state whether, in your opinion, if the defendant had not infringed this design, you would have sold, beyond any doubt, at least as many pieces as they sold, of the infringing design.

A. Undoubtedly.

Q. 17. What steps did the Hartford Company take, besides serving the defendant, to make up the loss occasioned to their trade by said infringement?

A. Well, of course, if we had sold the legitimate quantity of this particular pattern, we would not have had to try other patterns to take its place; it would have saved us the expense of experimenting, cutting cards, and trying samples of some other pattern to take its place.

(Question repeated.)

A. We have to get up other patterns.

Q. 18. What was the expense of that, the getting up of other patterns, which expense was occasioned by said infringement?

55 A. Well, I don't know exactly as I could answer that question excepting in this way: That this pattern in question ran, when it was at its best, a third of our looms.

Q. 19. How many looms were there?

A. Over twenty—between twenty and thirty—running at one time on this particular pattern. Well, since that time the number has decreased, dwindled down till we only run about one loom on it.

Q. 20. Was that owing to the infringement, as you believe?

A. I have no doubt if the carpet had not been infringed we should have made more of it.

Q. 21. What did you do to keep those twenty looms going?

A. We were to a very large expense in getting up designs, and our designing expense would be, probably, not far short of $20,000;

that is, for designing and experimenting on samples, and cutting cards, and getting the patterns correct in samples.

Q. 22. All of which expense was caused by this infringement?

A. A portion of that; it would cost us $20,000 a year for our business, and if we ran a third of our looms on one pattern six months, why, that would make the actual cost of one pattern in the neighborhood of $3,000; that is a fair way to put it.

Q. 23. Then one of the items of loss caused to you is an additional expense of about $3,000 for keeping the twenty odd looms busy, which would have been kept busy without an additional expenses, had it not been for such infringement; is that it?

A. That is the idea, exactly.

Q. 24. Do you feel able to state to what extent, if any, the defendants' goods made in infringement of your patent are inferior to the general goods of your corporation?

A. They are inferior in every respect, in quality of material, and also in the way they are made.

Q. 25. How would you express it as a matter of percentage; that difference?

A. From 20 to 25 per cent., I should think.

Q. 26. When applied to the cost of manufacturing, would there be that difference?

A. I don't know as I could answer that; I don't know the cost of manufacturing, exactly, of either of them.

56 Q. 27. Well, if these goods are about 20 or 25 per cent. inferior to yours in material and workmanship, is it not, in your opinion, reasonable to assume that it costs from 20 to 25 per cent. more to produce your pattern than it does to produce the defendants' pattern; apart from the cost of the original design, that would be reasonable?

A. I don't know the cost.

Q. 28. Without knowing the cost?

A. It seems reasonable enough; yes.

Q. 29. If you see a piece of manufacture of any kind made in imitation of another piece which exceeds the first in value by 20 per cent., would it not be reasonable to assume that one cost 20 per cent. more to produce than the other?

A. Yes.

Q. 30. Have you any idea as to what it did cost your corporation to get the patented design here in controversy, from the inception to its completion, ready for the market?

A. I should think from $250 to $300.

Q. 31. How do you make that estimate?

A. Well, that is about the average cost of a design.

Q. 32. Of any one design?

A. Of any design that we sell, from $250 to $300.

Q. 33. Mr. Dobson testifies that he thinks it cost you about $20, including the pay of the designer, the cutting of the cards, the rigging of the loom, and all the details necessary to complete an original design; what do you think of that kind of testimony?

A. When you come to put down the designer's salary you can

very soon figure up for yourself what it costs; it is simply a matter of figures.

Q. 34. What do you find it to be?

A. It is not far from $250 to $300.

Q. 35. You have made several estimates on that point?

A. Yes, sir.

Q. 36. And you have found that to be the actual cost in each case?

A. That is what we figure as the actual cost of a design that is put upon the market.

Q. 37. Did you lose trade, besides losing the sale of these particular goods, by virtue of the infringement?

57 A. The experience is that if you get up a very first-class pattern and it is copied in inferior goods, and a customer comes into your store and you show him the design, he says, "Yes, that is very pretty, but I can buy it in cheap goods;" the result is he does not buy it in the original goods.

Q. 38. Do you not also lose the sale of other goods besides, if a customer comes in, for instance, and sees this design, and finds it is more expensive than one he can buy of Dobson; do you not also lose besides this particular design?

A. I don't know.

Q. 39. An indirect loss of the trade?

A. Well, I could not estimate that.

Q. 40. Is it not the fact; I do not ask you to estimate it; does not the person who loses the sale of one line of goods, therefore indirectly lose the sale of other goods?

A. I do not know, Mr. Briesen, whether I could estimate that.

Cross-examined by Mr. BUCKLEY:

Cross Q. 41. You say it cost you about $20,000 a year to get up designs for your works, experiments, and so on; did it cost you any more in the past year than it did in years previous?

A. Yes; we spent more last year than we did the year before.

Cross Q. 42. How much more?

A. I could not give you the exact figures; I haven't it in my mind.

Cross Q. 43. That is, within the last year; I mean down to June 1st?

A. Yes, sir.

Cross Q. 44. Did you spend any more in the year ending July 1, 1879, than you did in the year ending July 1, 1878?

(Objected to, as immaterial and not at issue.)

A. I have not got the figures; I could not tell you.

Cross Q. 45. Do you employ a regular corps of designers?

A. Yes, sir.

Cross Q. 46. Do they have a regular salary?

A. Yes, sir.

58 Cross Q. 47. How many have you?

A. I cannot tell you just the number.

Cross Q. 48. About?

A. All told, men and youths, about a dozen.

Cross Q. 49. Well, the youths simply do the cutting out of the cards, don't they; the designing department is not included in the card department?

A. It is all done at the factory.

Cross Q. 50. Do you know whether you employed any more designers this last year than you did previously—the year ending June 1, 1880, than you did in 1879?

A. Yes, sir.

Cross Q. 51. How many more?

A. I could not tell you without referring to the record.

Cross Q. 52. Are you not a little uncertain whether you employed more?

A. No, sir; I know we employed more.

Cross Q. 53. Your general business increased during the year ending June 1, 1880, over what it was in the year ending July 1, 1879?

A. Well, our general business has increased, because we are making more goods, different grades; it does not come into this matter at all, though.

Cross Q. 54. You have designers for all grades of goods though, haven't you?

A. Yes, sir.

Cross Q. 55. The more goods you make, the more designs you get up?

A. Yes, sir; the more different grades of goods, of course, we have to have more designers; those who make designs for this fabric do not design for any other fabric.

Cross Q. 56. You say there is twenty per cent. difference in the material between carpets manufactured by your company and those manufactured by the defendant?

A. I say, in my judgment, the goods manufactured by Dobson are worth twenty per cent. less than our goods.

Cross Q. 57. On account of the materials?

A. And manufacture and finish and everything.

Cross Q. 58. That is true of all other goods, is it not?

(Objected as incompetent, unless the goods are produced.)

59 A. These goods that are here, it is.

Cross Q. 59. Are you not acquainted with their general manufacture; the goods they generally sell?

(Objected to, as not an issue.)

A. No, sir; not generally.

Cross Q. 60. You know that to be the case, that the general report of their goods is that they are inferior in both material and make, to those of your company?

(Objected to, as not an issue.)

A. That is the reputation they have, yes, sir; poorer goods.

Cross Q. 61. They make a cheaper grade of goods?

A. They make a poorer quality of goods.

Cross Q. 62. How many designs do you turn out in a year?

A. Whether they are made or not?

Cross Q. 63. Yes.

A. About 300.

Cross Q. 64. Do you know how much you pay for salaries to your designers?

A. No, sir; not without figuring it up; about $20,000 is about the mark for all these designs.

Cross Q. 65. What enables you to fix that sum as the amount?

A. That is based on the amount of salary paid designers, and an estimate of the cost of experiments.

Cross Q. 66. You say you don't know the amount of salaries paid your designers?

A. I don't know without figuring it up.

By Mr. BRIESEN:

Cross Q. 67. State whether you did figure it up from your books.

A. Yes; I have figured up from actual knowledge of what we paid different men. That question that you asked about 300 designs, I don't mean that we manufactured that number.

Cross Q. 68. The designers turn them out and you select from those what you make?

A. Yes, sir.

60 Cross Q. 69. As near as you can come to it, about what portion of the designs turned out do you manufacture?

A. About one in three; perhaps one in four.

Cross Q. 70. How do you know that you sold 800 pieces of these goods the first year?

A. From the books.

Cross Q. 71. You made up that statement from your books?

A. Yes, sir.

Cross Q. 72. Do you know who you sold them to?

A. Various parties throughout the country; I could give you the names if I had the books here.

Cross Q. 73. The figures here which you give as the number you sold are not from your recollection, from the estimate taken from your books?

A. My recollection is based upon the estimate taken from the books; we could not get any estimate any other way.

By Mr. BRIESEN:

Cross Q. 74. You brought a memoranda along showing precisely how many pieces you had sold, did you not?

A. I did.

Cross Q. 75. Did you take that memorandum from your books?

A. I did.

Cross Q. 76. Have you any objection to showing that memorandum to counsel for defendant?

(Witness shows memoranda to counsel.)

Cross Q. 77. That is for this peculiar pattern?

A. That is for No. 1161, which is the carpet here in controversy.
Cross Q. 78. 1161 is your trade number, isn't it?
A. Yes.

Mr. BUCKLEY: Since the testimony of this witness is taken from their books, I call for the books of the original entry, which contain the entries of these sales of 800 and 380 pieces, respectively, and for the production of those books before the master.

61 Cross Q. 79. Will you produce them?

(Counsel for complainant states that he will not produce them unless the master orders their production.)

Cross Q. 80. Did you make the entries in these books from which you took these figures?
A. Yes, sir; most of them, if not all.
Cross Q. 81. You did not make all of them.
A. I cannot say positively whether I did or not; I made the bulk of them.

Defendants' counsel objects to the testimony of this witness, touching the number of pieces sold by them, because—
1st. The testimony is based upon certain book entries, which books the witness and counsel for complainant refuses to produce.
2d. Because the entries upon which he bases his testimony he is not sure were all made by him.

Cross Q. 82. Will you produce these books before the master?

Complainants' counsel requests the witness not to answer the question.

A. The books, of course, are in use all the time, and it would be very awkward to bring them away, but I am prepared to swear to the accuracy of the statement I have made.

By Mr. BRIESEN:

Cross Q. 83. State, if you please, to me whether you personally took the figures from the books?
A. Yes, sir.
Cross Q. 84. And you solemnly swear that those figures harmonize with the books?
A. They may vary within 35 pieces.
Cross Q. 85. How do they vary from the books?

A. When I give you 380 and 800, I do not mean to say that
62 our books will show exactly 800 pieces; we have actually made more than I have said; they will show 816 pieces, or thereabouts.

By Mr. BUCKLEY:

Cross Q. 86. You cannot state from your own knowledge the number of pieces sold by you in the last one or two years of other patterns—special patterns which were not infringed—can you?

(Objected to, as not in issue.)

A. No, sir.

Cross Q. 87. Are those estimates of yours, regarding the cost of the manufacture, based upon entries in your books also?

A. I have not given any estimate as to cost of manufacture.

Cross Q. 88. Is this estimate of $20,000, which you have made as the cost of getting up designs, putting into looms, experimenting, &c., based upon entries made in your books?

A. No, sir.

Cross Q. 89. From your own recollection?

A. From my knowledge of the cost.

Cross Q. 90. Can you remember now the details by which you arrive at those figures?

A. No, sir.

Cross Q. 91. How did you arrive at those figures?

A. I have answered that before.

Cross Q. 92. Answer it again.

A. By taking the cost of the designing department and the cost of experimenting——

Cross Q. 93. From what?

A. Actual costs.

Cross Q. 94. Where did you get the costs from?

A. From the amount of money paid.

Cross Q. 95. How much money did you pay?

A. I cannot tell you the different items, because I cannot recollect them; I could give you the total.

Cross Q. 96. By Mr. BRIESEN: How much is the total?

A. $20,000.

63 Cross Q. 97. Are not those items down in the books of the company?

A. I don't know, sir.

Cross Q. 98. Then you don't know whether you make entries in your books of the amount of salary paid to your designers?

(Objected to, as the witness is only a salesman, and, therefore, as calling for hearsay.)

A. I do not know what entries are made.

Cross Q. 99. You are a salesman, are you?

A. Yes, sir.

Cross Q. 100. How do you know this money was paid to the designers, that is, that the items were paid which in the aggregate amount to about $20,000?

A. I know that is the cost to our company.

Cross Q. 101. How do you know; did you pay the money yourself?

A. I know what is paid to the designing department.

Cross Q. 102. I asked you that question, and you said you did not know.

A. I said I could not give you the figures without figuring it up; I cannot give you the items.

Cross Q. 103. From whom did you get those items if you did not pay the money yourself?

A. I got them from my knowledge; I know what the items are.

Cross Q. 104. Do you mean it came to you by intuition?

A. No, sir.

Cross Q. 105. Did you get them from the check-book?

A. I know what we pay our designing department, because I have a good deal to do with that department.

Cross Q. 106. How do you know; you do not pay the money, you are not the book-keeper?

A. I know what we pay the designers.

Cross Q. 107. How did you obtain this knowledge?

A. Because I have charge of the department.

Cross Q. 108. Are you located at the store or factory?

A. Store.

Cross Q. 109. Where are these designers?

A. At the store, sir; all of them.

Cross Q. 110. Are these experiments made at the store?

64 A. No, sir.

Cross Q. 111. Your looms are at the mill?

A. Yes, sir.

Cross-Q. 112. In Hartford?

A. Thompsonville, Ct.

Cross-Q. 113. Then you know the salaries paid to designers from what they tell you, do you?

A. No, sir; I know what arrangements are made; what salaries are agreed to be paid to them.

Cross-Q. 114. Did you engage them?

A. Some of them.

Cross-Q. 115. Did you disburse this money for these experiments at the factory?

A. No, sir.

Cross-Q. 116. How did you arrive at the figures which make up the $20,000?

A. It is an estimate.

Cross-Q. 117. Upon what do you base that estimate?

A. On the loss of time, material, waste, &c.

Cross-Q. 118. How do you know what the cost of material and cost of waste, &c., is, when the factory is situated at Thompsonville, and you are a salesman in the store in New York?

A. Because I am thoroughly acquainted practically with the business.

Cross-Q. 118½. How do you know the amount of material and waste used in experimenting?

A. Because I know exactly from practical experience what it is.

Cross-Q. 119. Then this estimate of yours is founded upon a general idea, but not upon any actual figures?

A. Founded upon a general—yes.

Cross-Q. 120. A general idea?

A. Well, it is a general idea; at the same time it is a fact.

Cross-Q. 121. You have no actual figures to work upon?

A. I have upon the designers' department.

Cross-Q. 122. I am speaking of these experiments.

A. In the designing department I have the figures to go on; on the experiments it is an estimate.

Cross-Q. 123. An estimate based upon your general knowledge of the business?

65 A. Yes, sir.

Cross-Q. 124. You do not go up there and see the amount of waste which occurs?

A. I go up there sometimes; yes, sir.

(Defendants' counsel objects to this witness' testimony as to the cost of getting out these designs, and the testimony as to the cost, generally, in experimenting and putting into looms, as being founded upon vague and general estimates, and upon no accurate knowledge.)

Redirect by Mr. BRIESEN:

Q. 125. What proportion of the $20,000 do you reckon for experiments?

A. About one-third.

Q. 126. The balance is paid to draughtsmen?

A. Yes, sir.

Q. 127. Apart from your books, are you able to state, as a matter of fact, that you sold over 800 pieces of this carpet during the period ending June, 1879?

A. Yes, sir.

Q. 128. And that you have sold little over 300 pieces since?

A. Yes, sir.

(Objected to by defendants' counsel, as the witness has already stated that he based that estimate upon figures in the books, and then refuses to produce those books.)

Q. 129. So that if you had not taken them from the books, you would have stated here to the same effect, would you not?

(Objected to, as hypothetical and leading.)

A. Yes, sir; to the same effect.

Q. 130. Did you take those figures from your books at my request?

A. Yes, sir; to be more accurate.

Q. 131. You state that the expense of making designs and experimenting is about $20,000 per annum, and that about 300 new designs were made, and that of these about one-third is made

66 into carpets, which would make about one hundred designs made into carpets, the cost of which would be about $200 for each carpet actually made. How do you arrive at the additional amount of from $250 to $300, which you say you found to be the actual expense of getting a carpet ready for the market?

A. I have taken into that estimate simply the estimate of the designers' salaries and cost of experimental samples; I have taken no estimate of the cost of material, for designing, and all that kind of thing.

Q. 132. How about cutting cards?

A. Cutting cards is really included in the experimenting, but

then there is the loss; for instance, we sell samples at half price; there is the loss of half the cost of every sample that is made.

Q. 133. That adds to the expense of the average?

A. Yes.

Q. 134. Do you make as poor goods in body Brussels as the defendant?

A. No, sir.

Q. 135. What is defendant's reputation as to honest dealing in the market?

A. He copies every design he can get.

Q. 136. Do you mean with permission of the originators?

A. No, sir; he has the reputation of paying nothing for designs, but stealing them from manufacturers.

(Counsel for defendant objects to such questioning as immaterial, and states that he is willing to be sworn that the defendants employed a corps of designers themselves to get out original designs for them, and that the answer of the witness as to defendant's stealing every design he can get is vague, immaterial, and not based upon facts, to defendant's counsel's own knowledge.)

Q. 137. Before this suit was commenced by the Hartford Carpet Company, were the defendants politely invited to discontinue the infringement, as far as you are aware?

A. Yes; I believe there was a letter written to that effect.

Q. 138. Did they discontinue it in view of that invitation?

A. No, sir; they even sold the carpet after the injunction was served.

67 Q. 139. Sold the infringement of this carpet?

A. Yes, sir.

Q. 140. How do you know that?

A. I had a party go there and purchase it at their store.

Q. 141. Of Dobson?

A. Yes, sir.

Q. 142. Have you got that piece?

A. Yes; I can produce part of it, and can produce the bill of it too.

Q. 143. I will ask you, Mr. Fowler, to produce a piece of that carpet, and the bill, and the person purchasing it, if possible, at the next meeting of this examination, unless you can do so now after a recess of 20 minutes?

A. I can produce the bill, and the man who purchased it.

Q. 144. How about the piece?

A. I could not get it in 20 minutes; I could get it to-morrow, possibly; I can get it; it is in New York.

The further examination of this witnes is adjourned to Wednesday, June 9, 1880, at 11 o'clock a. m.

He is requested for that session to produce exact abstracts from the books showing the numbers of carpets of patented designs actually entered in said books and sold, and also, if possible, to find the bill or the receipt of Dobson, and the piece of carpet which they sold

after the injunction was served, so as to be able, together with the person who made the purchase, to prove contempt of court.

The witness, Mr. Worth, being still present, counsel for defendant calls upon him to go upon the stand in order that he may ask him two or three more questions on cross-examination, touching the source of his knowledge as to the number of pieces of the various infringed designs sold by the Bigelow Company in the last few years.

Counsel for complainant says:

1st. That Mr. Worth is not correctly styled a witness—now, he being off the stand and regarded as a private gentleman.

2d. That an adjournment having been entered on the record it is absurd afterwards to call the witness to appear.

68 3d. That the desire to ask Mr. Worth further questions about his knowledge of the number of pieces sold is an after thought, and should have occurred to the learned counsel while the witness was in his clutches. Counsel for complainant certainly declines to produce a witness to accommodate the defense, knowing that the defendants have the right, in reply to the complainant's proofs, to subpœna and examine any witness which they may desire to examine, including Mr. Worth.

Adjourned to Wednesday, June 9, '80, at 11 o'clock a m.

69 United States Circuit Court, Eastern District of Pennsylvania.

THE BIGELOW CARPET COMPANY
vs.
J. & J. DOBSON. } In Equity.

THE SAME
vs.
THE SAME. } In Equity.

THE HARTFORD CARPET COMPANY
vs.
THE SAME. } In Equity.

NEW YORK, *June 9th*, 1880.

Met pursuant to adjournment. Counsel present as before.

Mr. Fowler not being present to continue his examination, another witness is called.

FRANCIS T. HOLDER, called on behalf of complainants, being duly sworn, testified as follows in answer to questions propounded to him by A. v. Briesen, Esq.:

My name is Francis T. Holder; I am forty-seven years of age; reside in Yonkers, Westchester county, N. Y., and am by occupation a manufacturer of carpets, employed by Alexander Smith & Sons, carpet manufacturers, of Yonkers.

70 Q. 1. How long have you been in the carpet business?

A. Twenty-two years, connected with the manufacturing of carpets.

Q. 2. Are you conversant with the expense of manufacturing carpets, and capable of estimating the cost of manufacturing them, as your business partly consists of that?

A. I think so; it wholly consists of that.

The privilege of the counsel for defendant as to objections applies to all testimony taken in this cause.

Q. 3. I now show you some body Brussels of the Bigelow Carpet Company, being the pieces of carpet about which the preceding witnesses have testified, and ask you to state what, in your estimation, is the cost of carpets of that quality I am speaking of the present time?

A. I should say $1.30, the cost of production.

Q. 4. That is the cost of what?

A. The cost of the carpets ready for selling, of course; not what he should realize, but what he should reckon they cost him.

Q. 5. You take into your estimate the price of wool?

A. The price of wool, labor, all the expenses of manufacturing and selling, interest, and everything—insurance.

Q. 6. How would you estimate the cost of the manufacture of the Hartford Company's goods, of which I now show you a piece?

(Complainants' counsel shows witness a sample of the Hartford Company's carpet, regarding which testimony has already been taken in this matter.)

A. In answering that I have got to make a sort of general answer; the goods vary to some extent.

Q. 7. I am speaking of this kind.

A. I should say there would be about five cents difference in the cost; $1.25 per yard.

Q. 8. Have you any interest in this controversy?

A. No, sir; none at all.

Q. 9. How does the price or cost of making such carpets as the one about which you have testified compare to-day with the price of the same goods about one year ago?

71 A. About twenty per cent. more to-day; hardly that—fifteen to twenty.

Q. 10. About one year ago, therefore, the expense of making the Bigelow carpet of the kind shown you would have been about $1.10 a yard?

A. From $1.06 to $1.10, I should say.

Q. 11. And the Hartford Company's goods from $1.00 to $1.08?

A. Yes, sir; the same proportion.

Cross-examined by Mr. BUCKLEY:

Cross-Q. 12. In estimating the cost of the Bigelow Carpet Company's goods, such as have been shown you, at the present time, you are estimating upon the price of wool and of labor as it is to-day in the market, are you not?

A. Yes, sir.

Cross-Q. 13. Are you aware of whether the goods shown you are made from wool bought to-day, or bought one year ago?

(Objected to, as immaterial.)

A. No, sir.

Cross-Q. 14. What was the price of wool as compared with the price to-day?

A. I could not tell you.

Cross-Q. 15. Was it lower or higher?

A. It is higher now than a year ago, but I don't buy it; I have only the manufacturing to do; I take the yarns and make the carpets.

Cross-Q. 16. Then, strictly speaking, you are not aware of what these carpets did cost the Bigelow Company?

A. No; I know what they ought to cost them; I know what the price of yarns were at this time; I know what they should cost.

Cross-Q. 17. Is not the same true of the Hartford Company's goods which you have just answered, in relation to the Bigelow Company's goods?

A. Yes, sir.

Cross-Q. 18. You are not aware of what they paid for their wool, or whether they have manufactured from wool in stock,
72 how long they may have had that wool, or whether these carpets have been manufactured from wool bought at the present time, at present prices?

A. I don't know that, sir; my estimate of the value of the goods is based upon the value of yarns at the present time and a year ago.

Cross-Q. 19. You are not aware of how long these goods have been made, are you?

A. No, sir.

Cross-Q. 20. Whether for the Bigelow or for the Hartford Company?

A. No, sir.

Cross-Q. 21. You are aware that the prices of labor, at the present time, is higher than it was one year ago?

A. Yes, sir.

Cross-Q. 22. In carpet mills?

A. Yes, sir.

Redirect by Mr. BRIESEN:

Q. 23. Do you produce carpets at the factory at which you are employed of substantially the same character as those which you have testified about?

A. No, sir; not exactly the same.

Q. 24. What is the price of wool to-day, do you know?

A. I don't know what is the price of wool.

Q. 25. What is the price of worsted?

A. The price of such worsted as is used in these carpets is from sixty to seventy-five cents per pound.

Q. 26. How many pounds do you calculate to a yard of these carpets?

A. One pound and a quarter per yard.

Q. 27. For Brussels carpet of this quality?

A. Yes, sir; I am speaking of what the price of wool is in the market, not what it costs the manufacturer.

Q. 28. How much do you calculate for the threads which are not worsted in said carpet—the linen threads or whatever they are?

A. There is one-third of a pound of cotton and one-third of a pound of linen; that is about what it is.

Q. 29. To a yard?

A. Yes, sir.

73 Q. 30. How do you estimate the price of the cotton?

A. It is worth at the present time about 22 cents a pound.

Q. 31. And the linen?

A. About the same.

Q. 32. How much do you estimate for the labor?

A. About fifteen cents.

Q. 33. Per yard?

A. Yes, sir.

Q. 34. How much for the dyes?

A. The dyes would be about four cents a yard.

Q. 35. How much for sundries—other items not already mentioned?

A. Six cents per yard.

Recross by Mr. BUCKLEY:

Cross-Q. 36. Did you fix this at .92 per pound for wool?

A. .92 per pound for wool.

Cross-Q. 37. At what price are you reckoning the wool?

A. I don't know; I know the price of wool in the market; I don't have anything to do with the buying; I know simply what the worsted is in the market.

Cross-Q. 38. In speaking of the price of wool in the market that refers as well to worsted as to wool, generally speaking, would it not?

A. I think, perhaps, it would be better for me to define my position; I have nothing to do with the yarn, except—I have to answer by the price of worsted, not from the price of wool.

Cross-Q. 39. Do you know the price of worsted in the market today?

A. Yes.

Cross-Q. 40. What is it?

A. From 60 to 75 cents per yard.

Cross-Q. 41. Do you know what it was one year ago?

A. From 45 to 50.

Cross-Q. 42. Did they use worsted or wool proper in manufacturing these goods?

A. Worsted in these goods.

Cross-Q. 43. You don't know whether they had that in stock or whether they manufactured it from some they had recently bought?

A. I do not.

74 Cross-Q. 44. Or how long they have had the carpets done?
A. I do not.

By Mr. BRIESEN:

Q. 45. Is the quality of the worsted in the Bigelow and Hartford goods inferior, as you find it here in the samples before you?
A. No, sir.
Q. 46. Is it the best?
A. It is as good as they ever put into that class of goods; the sample is a very good piece of goods.

The witness here signs the stenographer's notes, and the further signing of his testimony is waived by consent of counsel.

I, Willy G. E. Schultz, do hereby certify that the above witness, Francis T. Holder, was by me duly sworn before giving his testimony on the 9th day of June, 1880, and by consent of counsel subscribed to the stenographer's notes.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

The redirect examination of WILLIAM FOWLER continued, as follows:

By Mr. BRIESEN:

Q. 145. Mr. Fowler, did you investigate the matter of the sale by defendants of the infringing carpets after the injunction?
A. Yes, sir.
Q. 146. With what result?
A. I found that I was mistaken as to its having been after the injunction; it was after the notice had been served that they sold it.
Q. 147. After the notice to stop had been served?
A. Yes, sir.
75 Q. 148. Did you bring an exact extract from your books of the number of pieces of the carpet here in controversy that the Hartford Company had sold first, before July 1, 1879, and secondly, after July 1, 1879?
A. Yes, sir.

Counsel for defendants specially objects: the books being in existence, and being the best evidence, should be produced, and he calls for them.

Counsel for complainant declines to produce the books, as they contain matters, such as names of customers and transactions relating to other business not here involved, and as therefore not fit for publication or for examination by counsel for a competing house.

Counsel for complainants now gives notice that on the summing-up before the master he shall demand the production of the defendants' books showing all the entries relating to the sales of infringing carpets; also all the entries relating to the arrival from the factory of the infringing carpets here in controversy.

Counsel for defendants gives counsel for complainants notice that

the books are at his disposal whenever he properly subpœnas them, or whenever he is examining a witness who is giving testimony based upon knowledge obtained from those books.

Q. 149. What is the extract?

A. From January 1 to July 1, 1879, we sold of 1161 G. body, stair and border, 850 pieces; and from July 1, 1879, to June 1, 1880, 406 pieces.

Cross-examined by Mr. BUCKLEY:

Cross-Q. 150. How long does the season last in the carpet trade?

A. Six months.

Cross-Q. 151. Is there a spring and fall trade?

A. Yes, sir; that takes the six months.

Cross-Q. 152. Does not a carpet season mean the spring season?

A. Yes.

76 Cross-Q. 153. And is not the fall trade called another season?

A. Yes, sir.

Cross-Q. 154. What have you given the present memorandum of the number of pieces sold from?

A. That is the actual number of pieces which we have sold.

Cross-Q. 155. You give that from a memorandum at present in your hands, do you not?

A. Yes, sir.

Counsel for defendants calls for memorandum; the witness produces it. Offered in evidence by complainants' counsel, and the same is marked "Exhibit Fowler's Mem.," June 9, 1880.

WILLIAM FOWLER.

Sworn to before me, this 9th day of June, 1880.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

77 COMPLAINANTS' EXHIBIT.—FOWLER MEM.—JUNE 9, '80.

P. O. Box 3977.

REUNE MARTIN, Agent for the Hartford Carpet Company,
Nos. 114 and 116 Worth street,
NEW YORK, *June* 9, 1880.

Number of pieces of 1161 G. body, stair, and border sold.

From Jan'y 1 to July 1, 1879	830 ps.
" July 1, 1879, to June 1, 1880	406 ps.

Complainants rest, but give notice, as before, that he desires the production of defendants' books, hereinbefore referred to, for use at the summing up before the master, and if defendants' counsel will not promise to produce them a subpœna to that effect will be made out at the defendants' own expense.

Counsel for defendants, in pursuance of the stipulation entered into, to save unnecessary writing and interpolations between questions and answers, now objects to the whole line of this examination as immaterial and irrelevant, presumptive and incompetent, and the objections above made are reiterated, in accordance with the said stipulation, and with the same effect as though made when each question was propounded; the cross-examination of the witnesses being *de bene esse*.

Testimony closed.

Adjourned.

78 United States Circuit Court, Eastern District of Pennsylvania.

THE BIGELOW CARPET CO. *vs.* J. & J. DOBSON. } In Equity.

THE SAME *vs.* THE SAME. } In Equity.

THE HARTFORD CARPET CO. *vs.* THE SAME. } In Equity.

STATE OF NEW YORK, *County of New York*, } *ss.:*

I, Willy G. E. Schultz, a notary public in and for the county of Kings, State of New York, my certificate being duly filed with the clerk of the county of New York, State of New York, do hereby certify that the depositions of the foregoing witnesses, William James, of New York city, N. Y.; David M. Read, of Bridgeport, Conn.; John H. Worth, of Westfield, N. J.; William Fowler, of Orange, N. J., and Francis F. Holder, of Yonkers, N. Y., were taken before me, by a stenographer, and by consent of counsel for the respective parties, and pursuant to notice hereto attached, and upon a day to which the taking of testimony had been adjourned by consent of counsel. That the said witnesses were by me, before giving their testimony, duly sworn and cautioned to tell the truth, the whole truth, and nothing but the truth, and that the said depositions were taken for the use of the master, under the reference in the above cases; and further, that counsel for the respective parties were preseht at the time of taking the foregoing depositions.

[SEAL.] WILLY G. E. SCHULTZ,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

79 And afterwards, to wit, on the 8th day of March, A. D. 1881, the complainants, by their counsel, come into our said

court here and files an affidavit sur motion to refer back the report of the master, which being read, is as follows, to wit:

U. S. Circuit Court, Eastern District of Penn'a.

BIGELOW CARPET COMPANY *vs.* DOBSON. } In Equity.

BIGELOW CARPET COMPANY *vs.* DOBSON. } In Equity.

HARTFORD CARPET COMPANY *vs.* DOBSON. } In Equity.

EASTERN DISTRICT OF PENNA, *ss:*

Joseph C. Fraley, having been duly affirmed, deposes and says:

I am solicitor for complainant in each of the above
80 cases. Some time in January, 1881, I received notice that the master's report therein had been filed, but would be retained by the master until February 1st, 1881, for the filing with him of exceptions, &c.

On the 31st day of January, 1881, I received from A. v. Briesen, Esq., counsel for complainant, a motion paper, which he requested me to file with the master before February 1st; said paper was a motion to reopen the proofs. I went immediately to the office of the master, and was informed by his clerk there that he was out of town, and would probably return in some days, upon which I left word that I was anxious to see him. On the morning of February 1st the master called at my office and asked what I wished to see

him for, and upon my stating to him that I desired to sub-
81 mit a motion to reopen the proofs said that he thought it was too late, as he had just deposited his report with the clerk that morning.

JOS. C. FRALEY.

Affirmed and subscribed before me, this 8th day of March, 1881.

SAMUEL BELL,
U. S. Com'r.

(Endorsed:) U. S. circuit court, east. dist. of Pa. Bigelow Carpet Co. *vs.* Dobson. Affidavit. Filed March 8th, 1881.

82 And afterwards, to wit, on the 8th day of March, A. D. 1881, this cause came on to be heard on motion to refer back the report of the master, whereupon the court made the following order, to wit:

U. S. Circuit Court, Eastern Dist. of Penna. In Equity.

BIGELOW CARPET COMPANY *v.* DOBSON.

SAME *v.* SAME.

HARTFORD CARPET COMPANY *vs.* SAME.

And now, to wit, this eighth day of March, A. D. 1881, on motion of complainants' counsel and affidavit filed it is ordered that
83 the master's report in each of the *of the* above cases be referred back to said master, with power to entertain a motion to reopen the proofs therein, and to make such further order respecting the proceedings before him as he may deem expedient.

(Endorsed:) U. S. circuit court, east dist. of Pa. In equity. Bigelow Carpet Co. *vs.* Dobson. Same *v.* Same. Hartford Carpet Co. *v.* Same. Order referring back report of master. Entered & filed March 8, 1881.

84 And afterwards, to wit, on the 8th day of July, A. D. 1881, the master files his supplemental report, which, being read, is as follows, to wit:

United States Circuit Court, Eastern District of Pensylvania.

HARTFORD CARPET COMPANY *vs.* DOBSON *et al.*

BIGELOW CARPET COMPANY
vs.
DOBSON *et al.*
} Two Cases.

Supplemental report of the master appointed in the above cases, sur motion on behalf of the complainants, and argued before him April 9, 1881, under the order of court made herein March 8, 1881.

To the honorable the judges of the said court:

The master, to whom this cause was returned with instructions to entertain and pass upon such motion with respect to reopening the testimony as should be made herein by the complainants, respectfully reports:

That on Saturday, April 9, 1881, a motion founded on the attached notice and affidavit was made before him by counsel for the complainants, and argued by said counsel and by counsel for the defendants.

It was urged on behalf of the complainants that their refusal to produce certain books of account, with respect to which some
85 of their witnesses testified under objection, and an unavailing call for said books on the part of counsel for the defendants, was a refusal conditional on the ruling of the master; and that the master not having ruled on the question until the filing of his report, they should now be allowed to produce said books, and take further testimony explanatory thereof.

The call for the books, above noted was only made in one of the three cases, viz., that in which the Hartford Carpet Company is complainant, similar testimony having been taken in the other two cases without specific objection, and duly considered by the master in drawing his report therein.

For the reason stated in the reports filed in said two cases (those of the Bigelow Carpet Company *vs.* Dobson *et al.*), the master is of the opinion that even if the facts testified to under the above objection, and call for the books, were before him without objection, and as admittedly true, the Hartford Co. would still have failed to prove what damage they had sustained by reason of the defendants' infringement of their design patent, and he, therefore, can see no good reason for reopening the record in that case and allowing evidence already determined in the same record (for the testimony in these three cases was all taken together, and forms one record), to be incompetent to show the damage suffered by said complainant to be introduced. With regard to the cases of the Bigelow Carpet Company against Dobson *et al.*, the master is of the opinion that the motion is misentitled therein, since, as above stated, testimony of the nature specified in the notice was taken therein without objection, and considered by the master in drawing his report therein.

With respect to the case of the Bigelow Company *vs.* Dobson *et al.*, No. 35, in which, as stated in the affidavit hereto attached, the complainant, through a misunderstanding of counsel, failed to prove the amount of carpet of the infringing design made by the defendants, and the amount of profit accruing by reason of said sales, the master is, by reason of the fact that the proof referred to was in evidence in the record, with respect to the other case, brought by the same complainants, and was given due consideration therein, unable to see that the said complainant was in any way prejudiced by the omission, especially as on the argument counsel for
86 the complainants expressly waived the question of profits, and stated that he confined his claim entirely to damages.

The master, therefore, having had all the testimony now sought to be introduced before him in the record in question, and having, in his report in the case of the Bigelow Co. *vs.* Dobson *et al.*, No. 34, made his report on a case embracing all the facts now sought to be supplied in the other two cases, is of the opinion that sufficient cause has not been shown to justify him in reopening the record, and therefore he refiles his reports herein, as heretofore drawn.

Respectfully submitted,

FRANCIS T. CHAMBERS, *Master.*

(Endorsed:) United States circuit court, eastern district of Pennsylvania. Hartford Carpet Co. *vs.* Dobson *et al.* No. 30. Bigelow Carpet Co. *vs.* Dobson *et al.* Nos. 34 & 35. April sess., 1879. Supplemental report of the master. Filed July 8, 1881.

87 And afterwards, to wit, on the 27th day of July, A. D. 1881, the complainants, by their counsel, come into our said court

here and file exceptions to the supplemental report of the master, which being read, is as follows, to wit:

United States Circuit Court, Eastern District of Pennsylvania. In Equity. April Session, 1879.

THE HARTFORD CARPET COMPANY
vs.
JOHN DOBSON and JAMES DOBSON, trading as John and James Dobson. } No. 30.

Exceptions by and on the part of the Hartford Carpet Company, complainant in the above-entitled suit, to the report of Francis T. Chambers, Esq., to whom this case was referred by an order entered herein at the April term of this court, in the year 1879.

First. The said complainant excepts to the finding and report of the said master, for that he fails to find and report the profits
88 which the said defendants made by their infringement of the letters patent in controversy; whereas the proofs show that the defendants did make certain profits by reason of their said infringement, and also show the amount thereof, and the decree appointing the said master directed him to take an account of said profits.

Second. The complainant further excepts to the report of said master, for that the said master does not find and report that the complainant made a profit on carpets embodying the patented design in controversy in this case, and what the profit on said carpets was; whereas the testimony before said master shows that there was a profit to the complainant, and gives a basis for fixing the average profit.

Third. Complainant further excepts to the report of the said master, for that the said master disregards and rules out the testimony of the witness William Fowler, called on the part of complainant, on the ground that the books on which said Fowler's evidence was based were not produced before the master, and further excepts, for that the master failed to rule upon said objection upon the taking of the testimony before him, and failed to rule upon the said objection at the final hearing and argument before him, and never did rule upon said objections until his final report in this case, when he sustained the same and ruled out the testimony of said Fowler, and that complainant was thereby misled, and believed that said objection had been waived or overruled, and that the testimony of said Fowler was properly before the master, and thus failed to produce the books and obviate the objection, or to take other testimony upon the point, as the complainant might have done.

Fourth. Complainant further excepts to the report of the said master, for that he fails to find and report that there was a falling off in the complainant's sales of carpets embodying the patented design, and the extent thereof, and that said falling off appears to have been due solely to the infringement of the defendants in this suit.

89 Fifth. The complainant further excepts to the report of said master, for that he fails to find what is the lowest estimate shown by the evidence before him for loss of sales caused complainant by defendants' infringement, and to report and estimate as the loss of sales so caused at the lowest calculation; whereas the said master, from the evidence, could and should have so found and reported.

Sixth. The complainant further excepts to the report of said master, for that the said master does not find what was the decrease of complainant's sales due to the infringement by these defendants; whereas the evidence before him was sufficient to enable him [to] determine said decrease of sales.

Seventh. The complainant further excepts to said report for that the master fails to find that one element of the damage caused the complainant by the defendants' infringement was the profit complainant would have made on the carpets embodying the patented design, whose sale complainant lost on account of defendants' infringement; whereas the master should have so found and reported.

Eighth. The complainant further excepts to said report for that the master fails to find and report the amount saved by the defendants by copying the design in controversy from the complainant, instead of producing it as an original design themselves; whereas the evidence shows what it cost to produce this patented design.

Ninth. The complainant further excepts to said report for that the master awards to the complainant the sum of six cents as damages for the infringement by the defendants of the design patent in controversy; whereas the said master should have fixed the amount of complainant's damages at a sum other and greater than that which he has reported.

July 27, 1881.

BRIESEN & BETTS,
Compl't's Sol'rs.

90 (Endorsed:) No. 30. April sess., 1879. U. S. circuit court, E. D. of Pennsylvania. The Hartford Carpet Co. *vs.* John Dobson and James Dobson. In equity. Exception to master's report. Briesen & Betts, sol'r- for compl'ts, 229 Broadway, New York. Filed July 27, 1881.

91 And afterwards, to wit, on the 19th day of January, A. D. 1882, this cause coming on to be heard on exceptions to master's report, and being argued by counsel for the respective parties, the same is held under advisement.

And afterwards, to wit, on the 27th day of January, A. D. 1882, the court, by the Hon. William McKennan, circuit judge, file the following opinion, to wit:

BIGELOW CARPET CO.
vs.
JOHN & JAMES DOBSON. } No. 34. Ap'l Term, 1879.

SAME PL'FFS
vs.
SAME DEF'TS. } No. 35. Same Term.

THE HARTFORD CARPET CO.
vs.
SAME DEF'TS. } 7030. Same Term.

92 McKENNAN, Cir. J.:

These were all suits for infringement by the respondents of designs for carpets patented to the complainants. The infringing designs are exact counterparts of the patented ones, and carpets embodying them were put upon the market by the respondents some time after the date of the patents and the introduction of carpets containing the designs described in them by the complainants. No defence was made by the respondents, and they, therefore, occupy the attitude of willful infringers.

Under these circumstances the respondents ought to be held to the most rigid accountability, and no intendment ought to be made in their favor founded upon the alleged inconclusiveness of the complainants' proof of loss. On the other hand such proof ought to be considered and interpreted most liberally in favor of the complainants, within the limit of an approximately accurate ascertainment of their damages.

The master has not so dealt with the evidence presented to him, and has, therefore, fallen into error in his conclusion. He has found nominal damages only in favor of the complainants, although they furnished proof, by which the damages claimed by them might, to some extent at least, be legally measured.

In this category is the evidence of the number of pieces and yards of the complainants' carpets during the season of its first introduction upon the market, the cost per yard of their manufacture and the prices at which they were sold in the market, the number of pieces and yards of infringing carpets made and sold by the respondents in the following season, and the very large decline in the complainants' sales during this period. It furnishes the means of accurate computation of the complainants' profits, and of the extent to which the market was occupied by the respondents. All that is left for presumption is that the infringing carpets displaced in the market the complainants' carpets, and hence that the profits which would have accrued to them upon the quantity of carpets put upon the market is the measure of their damages.

This presumption, as against a wrong-doer, is not unreasonable, and it has the sanction of numerous decisions: Putnam *v.* Lomax, 9 Fed. Rep. 448; American Saw Co. *v.* Emerson, 8 Fed. Rep. 886; McComb *v.* Brodie, 2 O. G., 117; Westlake *v* Cartter, 4 O. G., 636.

Upon this basis there is no difficulty in stating an account against the respondents. And this is the only one upon which, under the evidence, the complainants' damages can be computed. It is enough for us to say that the losses claimed for the entire decline in the complainants' sales, and on looms, are too remotely connected with

the defendants' acts as their supposed cause, and hence are too speculative in their character to entitle them to allowance.

It sufficiently appears that the respondents made and sold 20 pieces of 55 yards each, 1,100 yards in all, of carpets containing the design described in No. 30 of April term, 1879 and that the complainants' profit upon carpets of that design was 67 cents per yard. They lost, therefore, this sum upon 1,100 yards, and their damages amount to $737, for which a final decree must be rendered in their favor.

In No. 34, April term, 1879, which is founded upon the patent for what is popularly called the "pagoda pattern," the respondents made 20 pieces of 50 yards each, in all 1,000 yards, the profit of complainants for like carpet being 75 cents per yard. The respondents have not disclosed what became of the carpets thus made by them, and they are, therefore, held accountable for them as if put upon the market. The complainants' damages in this case are then 75 cents upon 1,000 yards, equal to $750, for which a final decree will be entered in their favor.

In No. 35, April term, 1879, the respondents made 53 pieces of the Chinese lantern *patent* of 50 yards each, but sold only 35 pieces, the rest having been sealed up by the marshal. The complainants' damages in this case are therefore 75 cents upon 1,750 yards, amounting to $1,312.50, for which a final decree will be entered in their favor.

Endorsed: Nos. 30, 34, & 35, April sess., 1879. C. C. U. S., E. D. of Pa. Bigelow Carpet Co. *vs.* Dobsons. Three cases. Opinion, &c. Filed January 27, 1882.

93 And afterwards, to wit, on the 14th day of February, A. D. 1882, the court enter the following decree, to wit:

United States Circuit Court, Eastern District of Pennsylvania. In Equity. April sess. 1879.

THE HARTFORD CARPET COMPANY
vs.
JOHN DOBSON and JAMES DOBSON, trading as John & James Dobson, and also as "The Falls of Schuylkill Carpet Mills." } No. 30.

And now, to wit, this 14th day of February, 1882, this cause having come on to be heard upon exceptions to the report filed herein on the 8th day of July, 1881, by Francis T. Chambers, Esq., the master by the interlocutory decree entered herein on the 2nd day of September, 1879, to state an account of profits and assess damages under said decree, and having been argued by counsel for complainant and

94 counsel for defendants', after consideration thereof, it is ordered, adjudged, and decreed that the said exceptions be sustained, and that the findings of the master as to said profits and damages be overruled; and it is further ordered, adjudged, and decreed that the damages suffered by complainant in consequence of the unlawful sale by defendant of carpets in infringement of the design patent

No. 11074, referred to in said interlocutory decree, amounted to the sum of seven hundred and thirty-seven dollars; it is further ordered, adjudged, and decreed that the complainant do recover from the defendants the said sum of seven hundred and thirty-seven dollars, together with the costs of this suit, taxed at seventy-nine dollars and twenty cents, making in the aggregate the sum of eight hundred and sixteen dollars and twenty cents; and that the complainant have execution thereof.

95 And it is further ordered, adjudged, and decreed that the injunction heretofore ordered and issued against the said defendants be made perpetual.

(Endorsed:) No. 30. Ap'l sess., 1879. U. S. C. C., east. dist. of Pa. In equity. Hartford Carpet Co. *vs.* Dobson. Final decree. Entered and filed February 14, 1882.

96 And on the day and year last aforesaid the respondents, by their counsel, George E. Buckley, Esq., appear in open court and pray an appeal to the Supreme Court of the United States, and thereupon the court made the following order, to wit:

U. S. Circuit Court, E. D. of Pa. April Sess., 1879.

THE HARTFORD CARPET CO.
vs.
JOHN & JAMES DOBSON. } No. 30.

And now, to wit, this fourteenth day of February, A. D. 1882, George E. Buckley, counsel for defendants in the above cause, appearing in open court, prays an appeal to the Supreme Court of the United States from the decree of this honorable court, entered February 14, A. D. 1882, upon the exceptions of the complainant to the account of the master, filed in above cause, fixing complainants' damages, including costs at $816.20.

Which appeal is allowed with security in the sum of $1,750.

97 (Endorsed:) No. 30. April sess., 1879. C. C. U. S., E. D. of Pa. Hartford Carpet Co. *vs.* Dobson *et al.* Order allowing appeal to Supreme Court U. S., with security in $1,750. Entered & filed February 14, 1882.

98 In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit. April Sess., 1879.

THE HARTFORD CARPET CO.
vs.
JOHN DOBSON and JAMES DOBSON, doing business under the name and style of John and James Dobson, and of "The Falls of Schuylkill Carpet Mills." } No. 30.

Know all men by these presents, that we, John Dobson and James Dobson, as principals, and Sevill Schofield, No. 4216 Main St., Manayunk, and William Arrott, No. 2010 Spring Garden St., all of the city of

Philadelphia, and State of Pennsylvania, are held and firmly bound unto the above named, The Hartford Carpet Company, in the sum of one thousand seven hundred and fifty dollars ($1,750), to be paid to the said The Hartford Carpet Company, their certain attorney, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 28th day of February, A. D. 1882.

Whereas, lately, at a circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between The Hartford Carpet Company, complainant, and John Dobson and James Dobson, doing business under the name and style of John and James Dobson, and of "The Falls of Schulkill Carpet Mills," respondents, a final decree was rendered against the said John Dobson and James Dobson, doing business as aforesaid, and the said John Dobson and James Dobson, doing business as aforesaid, having taken an appeal, which appeal has been allowed by the said circuit court to the Supreme Court of the United States, to reverse the said decree in the aforesaid suit:

99 Now the condition of this obligation is such that if the said John Dobson and James Dobson shall prosecute their said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

JOHN DOBSON. [SEAL.]
JAMES DOBSON. [SEAL.]
SEVILL SCHOFIELD. [SEAL.]
WILLIAM ARROTT. [SEAL.]

Sealed and delivered in the presence of—
SAMUEL BELL.
W. VON A. WILHAMSON.

Approved in open court February 28, 1882.
SAMUEL BELL, *Clerk, &c.*

[Endorsed:] No. 30. April sess., 1879. Circuit court of the United States. The Hartford Carpet Co. *vs.* Dobson *et al.* Bond sur appeal. Filed February 28, 1882.

100 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of The Hartford Carpet Company, complainant, and John Dobson and James Dobson, trading as John and James Dobson, &c., respondents, on file

and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this fifteenth day of June, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of these United States the one hundred and sixth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 231. John Dobson & James Dobson, trading as John and James Dobson, & also as "The Falls of Schuylkill Carpet Mills," appellants, [*vs.*] The Hartford Carpet Company. Filed 7th July, 1882.

114-439

Office Supreme Court U. S.
FILED.
JAN 20 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 231. October Term, 1884.

JOHN DOBSON AND JAMES DOBSON,
Appellants,

vs.

THE HARTFORD CARPET COMPANY.

BRIEF FOR APPELLANTS.

HECTOR T. FENTON,
RICHARD P. WHITE,
Counsel for Appellants.

PHILADELPHIA:
DUNLAP & CLARKE, Printers, Hastings' Building, 819-21 Filbert Street.
1884.

Supreme Court of the United States.

No. 231. October Term, 1884.

JOHN DOBSON AND JAMES DOBSON,
Appellants,

vs.

THE HARTFORD CARPET COMPANY.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of the United States, for the Eastern District of Pennsylvania, by John Dobson and James Dobson, who were defendants below, and against whom the said Court entered a decree in equity for the payment of $737 and costs, and awarding a perpetual injunction, at the suit of The Hartford Carpet Company, appellee and complainant below.

The bill is founded on Letters Patent of the United States, No. 11,074, dated March 18, 1879, for the term of three and a half years, granted to The Hartford Carpet Company, as assignee of Winthrop L. Jacobs, for a design for carpets.

The bill, which was filed five weeks after the patent issued, charged infringement by appellants in the unlawful use of said design in the manufacture of carpets, in infringement of the

exclusive rights of the appellee secured by the patent. No defence was made, and a decree *pro confesso* was entered September 2, 1879, awarding an injunction, as prayed for, and referring the cause to a Master, to take an account of "the "gains and profits, which the said defendants have made by "their aforesaid acts of infringement, and also the damages "which the complainant has sustained thereby," together with costs.

In pursuance of his appointment, and by virtue of this decree, the Master heard the parties and their witnesses, and after careful consideration filed his report and supplemental report, to which exceptions were filed in due season by the appellee. The matter of these exceptions came on to be heard by the Circuit Court, and was argued by counsel, whereupon the said Court, on the fourteenth day of February, 1882, entered a decree, overruling the findings of the Master, sustaining the complainant's exceptions to his report, and awarding damages to the complainant, as stated, with costs, whereupon the defendants appealed to this Court.

INTERLOCUTORY AND FINAL DECREES.

The interlocutory decree awards to the complainants profits and damages, in the form usually adopted, for infringement of mechanical patents. The Master states in his report that the complainant, on the hearing before him, "expressly waived and abandoned all claim to the gains and profits which had accrued to the defendant by reason of the infringement, and limited his claim to the damages which it is alleged it sustained thereby." [See Master's Report, Record, page 8, folio 15.] The complainant's 1st and 8th exceptions are apparently

inconsistent with this waiver [see exceptions, Record, pages 57 and 58], but the Master has, no doubt, stated the fact correctly, as would appear from the language of the final decree [Record, page 60, folio 94], in which it is decreed "that the damages suffered," etc., amount to the sum awarded; and this is in accordance with language of the opinion contained in the 3d and 4th lines from bottom of page 59 of Record.

SUBJECT MATTER OF THE PATENT; AND HEREIN OF THE ISSUES ARISING UNDER THE REFERENCE TO THE MASTER.

The patent, in its title, purports to be for a "Design for a Carpet;" in the body of the specification it is said that "this invention relates to a new and original design for carpets, oil-cloths, and similar fabrics," and that "it consists of the new arrangement and ornamentation of parts hereinafter more fully pointed out." The drawings annexed to the patent consist of a photographic illustration of a face view of the design. [See Record, page 137.] The descriptive part of the specification [Record, pages 11 and 12] gives very little, if any, more information than is conveyed by an inspection of the drawings or photograph of the design. The claims are nineteen in number, claiming an equal number of different combinations and arrangements of the figures and forms shown in the drawing, and described in the specification. It is respectfully suggested that this is a very economical mode of obtaining protection for what ought to be the subject of nineteen separate patents, and is an open violation of the statute, which permits only a single invention to be comprised within one patent. The record is barren of proof as to which of these several

nineteen designs patented the appellants are alleged to have infringed; or which of them the appellee's testimony relates to, as being popular. It may be further suggested here that the practice of splitting up claims in a design patent is reprehensible, if not unlawful; it is not analagous to a mechanical patent, where the invention may reside as much in a novel part as in the whole. A design may be likened only to a mechanical patent which is for a new combination of elements, all of which are in themselves old; there, as in a design, the novelty consists in the aggregation of the old parts, constituting a novel unit; it is their union which produces a new thing, the integral parts form no part of the thing patented; it is the unit only which receives the protection of a patent. The design is a unit; it cannot consist of a part, or sub-combination of some of the several parts; it is the united whole that is patented, and claims for sub-combinations of figures, or for arrangements of several of the figures, if they form separately new designs, cannot be included with the whole in one patent; and for anything else attempted to be claimed, other than the whole as a unit, the patent is void, as having been issued without due authority of law for the grant.

It appeared by the proofs before the Master that the appellants had made and sold 20 pieces of carpet, of 55 yards each, making in all 1100 yards, like the patented design, but whether like the whole design, or like any of the 18 sub-combinations claimed in the patent, does not appear, from anything in the Record, except inferentially, when the witness, being shown the patent, Exhibit I, says they were of *that* design. It appeared conclusively that the appellants had made no actual profits in the manufacture and sale of these 1100 yards of carpet containing this design; and if they had, the

entire profit on the manufacture and sale of the carpet did not belong to the patentee; hence the appellee made formal waiver of "profits and gains," as such, awarded by the decree, and based its claim for "damages" upon speculative losses, caused by a decline in the market of the demand for its carpets of that pattern during the time covered by the alleged infringement, leaving it wholly to inference that the sales by appellants was the sole cause of such decline; and for losses on other items remotely connected therewith; and wholly failed to show any actual damage, by competent proof; hence the Master naturally and properly reported nominal damages only. The exceptions to the report, taken by the appellee, covered every possible ground on which any substantial sum of money could be awarded under the decree (presuming that there had been evidence to support any of them), whether in the form of actual profits realized, profits as savings, or profits which ought to have been made, or advantages in the form of profits, which the appellees thought they would, or ought to have made, had they sold the 1100 yards of carpet which the appellants made and sold. The final decree recites that the complainants' exceptions were sustained, but it is clear, from the opinion of the Court [see Record, page 59], that the first and eighth exceptions were not entertained, and that the subject matter of the remaining exceptions only, formed the basis of the conclusion reached by the Court.

ASSIGNMENTS OF ERROR.

I. The Court below erred in setting aside the Master's Report, and refusing to confirm the same and enter a decree in conformity therewith.

II. The Court below erred in not entering a decree for six cents damages, as recommended by the Master, because the evidence established the fact that the appellants had made no actual profit on the 1100 yards of carpets sold by them, and there was no competent evidence as to what damage, if any, the appellee had sustained by the alleged infringement.

III. The Court below erred in awarding any profits, or damages, to the appellee, under the evidence, because the measure of profits, or of damages, for infringement of a design patent, is not the whole profit on the manufacture and sale of the carpet bearing the design, but any increased value given to the goods by reason of such design, as to which there was no evidence whatsoever.

IV. The Court below erred in applying an entirely erroneous measure of damages to ascertain what, if anything, should be paid by the defendant, under the interlocutory decree.

V. The Court below erred in sustaining appellees second exception to the Master's Report, which was as follows:

"The complainant further excepts to the report of said Master, for that the said Master does not find and report that the complainant made a profit on carpets, embodying the patented design in controversy in this case, and which the profit on said carpets was; whereas, the testimony before said Master shows that there was a profit to the complainant, and gives a basis for fixing the average profit,"

because there was no competent evidence, or any evidence, to sustain the propositions contained in the exception; and, if there had been, the amount of *complainants alleged* profits does not furnish a proper measure to ascertain *defendant's*

profits, or plaintiff's damages, for the alleged infringement complained of.

VI. The Court below erred in sustaining appellee's third exception to the Master's Report, which was as follows:

"Complainant further excepts to the report of the said Master, for that the Master disregards and rules out the testimony of the witness, Fowler, called on the part of the complainant, on the ground that the books, on which said Fowler's evidence was based, were not produced before the Master, and further excepts for that the Master failed to rule upon said objection upon,—"the taking of the testimony before him. and failed to rule upon the said objection at the final hearing and argument before him, and never did rule upon said objections, until his final report in this case, when he sustained the same and ruled out the testimony of said Fowler, and that complainant was thereby misled, and believed that said objection had been waived or overruled, and that the testimony of said Fowler was properly before the Master, and thus failed to produce the books and obviate the objection, or to take other testimony upon the point, as the complainant might have done," —because the matter of the objection contained in this exception was cured by the reference back to the Master, and the filing of his supplemental report, and there was no attempt or offer made by the appellee to produce the books, or any other evidence, such as referred to in the exception, without which the evidence of said Fowler was wholly incompetent and inadmissible, being merely hearsay, he having no knowledge of the facts testified to by him, and his information being derived exclusively from said books, which were not in his handwriting, and which were not produced.

VII. The Court below erred in sustaining the appellee's fourth exception to the Master's report, which was as follows:

"Complainant further excepts to the report of said Master, for that he fails to find and report that there was a falling off in the complainants' sales of carpets embodying the patented design, and the extent thereof, and that said falling off appears to have been due solely to the infringement of the defendant in this suit,"

because there was no competent or sufficient evidence of any falling off of complainants' sales, and the Master so reports; and because there was not a scintilla of evidence that, if there was any such decline in complainants' sales, it was due, in whole or in part, to the alleged infringement; indeed, the learned judge, in his opinion, concedes this where he says, "All that is left for *presumption* is that the infringing carpets displaced in the market the complainants' carpets;" a presumption which the Court had no right or authority to make, for it was, in fact, *presuming* that the appellee has sustained *damage*, without any legal proof thereof.

VIII. The Court below erred in sustaing the appellee's seventh exception to the Master's report, which was as follows:

"The complainant further excepts to said report, for that the Master fails to find that one element of the damage caused by the defendant's infringement was the profit complainants would have made on the carpets embodying the patented design, whose sale complainants lost on account of defendant's infringement; whereas the Master should have so found and reported,"

because there was no proof that the appellee would have made any profit on the 1100 yards of carpet made and sold by ap-

pellants had the appellee made and sold the same; and also, because there was no competent or sufficient proof that the appellee made any profit on the carpet bearing the patented design, made and sold in its own establishment; and also, because, if there had been full proof of both or either of these items, the appellees would not have been entitled, under the law, to measure their alleged damage by the entire profit on the manufacture and sale of the carpet, but only such part, if any, due to the design printed or woven thereon.

IX. The Court below erred in sustaining the appellee's ninth exception to the Master's report, which was as follows:

"The complainant further excepts to said report, for that the Master awards to the complainant the sum of six cents as damages for the infringement by the defendants of the design patent in controversy; whereas the said Master should have fixed the amount of complainants' damages at a sum other and greater than that which he has reported,"

because the Master was clearly right in awarding nominal damages only in the absence of competent and sufficient proof, or any proof, of actual damage suffered by the alleged infringement.

X. The Court below erred in not dismissing the bill, because the patent was void on its face.

POINTS OF ARGUMENT.

The patent, on which the bill is founded, was issued by virtue of Sects. 4929 to 4933 of the Revised Statutes, and such is the present law on the subject. Sect. 4929 provides that "Any person who, by his own industry, genius, efforts, and expense, has invented and produced any new and original

means what the defendant has actually gained, and the latter what the complainant has actually lost, by the wrongful use of the invention.

Vulcanite Company *vs.* Van Antwerp, 9 O. G. 497,

and see—

Bancroft *vs.* Acton, 7 Blatch., 505.

This Court has said,—

Root *vs.* Railway Company, 105 U. S. page 212,

that it is manifest that the recovery of damages and profits is not intended to be double, but that when necessary the damages are to supplement that loss of the complainant, which the profits found to have been received are insufficient to compensate, and see

Birdsall *vs.* Coolidge, 93 U. S. 64,

wherein it is said that gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent.

With respect to patents for designs, such as for a carpet, oil cloth, calico print, or other pattern, in which the invention consists of mere ornamentation, as distinguished from configuration (both of which are protected under the act, but are widely different in character), it would be a harsh and unjust rule to compel an account of the entire profit made in the several stages of the manufacture of the goods. The patented ornamentation, or the novel configuration of an article, may or may not add to the saleability, or to the market value of the goods; on the other hand it may retard the former and decrease the latter. By analogy to mechanical patents, for parts

of a machine held to infringe the patent, the plaintiff should be required, in the first instance, to show not only that the defendant obtained an advantage from the use of the thing patented, but the worth of the advantage.

Blake *vs.* Cemetery Company, 16 Fed. Rep. 676.

And that in the absence of such proof, the plaintiff should be awarded a nominal sum only.

In Schillinger *vs.* Gunther, 14 O. G. 713,

in which the patent was a mode of laying concrete pavement in blocks, the Court said that the patentee was not entitled to the profits on the *pavement*, but merely to the profits, if any, due to his special device. So in the case of a patent, which is for a mere ornamentation on, or novel configuration of, an article which has a clear value, *per se*, it would seem to be necessary for a substantial award to a patentee, in an infringement suit, to show affirmatively that the novel configuration, or ornamentation, gave an enhanced value to the article upon which it was used, or increased the demand for it, and the extent of such increase in value or in sales, for it is that value only which the defendant has wrongfully appropriated, and which belongs to the patentee, if he makes use of his invention in, or upon, similar articles. The current of recent decisions has changed, very much, the former opinion that patentees were entitled to manufacturers' profits, upon the whole thing made and sold, of which their inventions formed only a part, and better authority confines such claims to the actual profit, if any, due to the patented part.

Littlefield *vs.* Perry, 21 Wall. 205.
Mowry *vs.* Whitney, 14 Wall. 620.

Black *vs.* Thorne, 111 U. S. 122.
Garretson *vs.* Clark, 111 U. S. 120.
Maier *vs.* Brown, 17 Fed. Rep. 736.
Calkins *vs.* Bertrand, 8 Fed. Rep. 755.
Cawood Patent, 94 U. S. 695.

And the burden of proof rests upon the plaintiff, for no profits can be recovered without proof that the use of the invention contributed to the general profits of the defendants' business. And the same result follows *where it is impossible to show the profitable effect of using the invention* upon the business results of the party infringing.

Root *vs.* Railway Company, 105 U. S. 202.

And where the entire profit of the business is shown, it is incumbent on the plaintiff to give evidence separating the profits which can be allowed from those which cannot be allowed; and in the absence of such proof, only nominal profits can be awarded.

Faulke *vs.* Kamp, 10 Fed. Rep. 675.

In the case at bar, we are relieved of the further necessity of discussing the question of what profits, as profits, the patentee is entitled to, for the evidence clearly establishes that the defendants made none, either by the use of the design, or in the manufacture of the carpet upon which it was impressed or woven. And, as was said in Elizabeth *vs.* Pavement Company, 97 U. S. 126, "If an infringer of a patent has realized no profit from the use of an invention, he cannot be called upon to respond for profits." Nor, as was decided in Livingston *vs.* Woodworth, 15 Howard, 559, can a Court of Equity, in a case where no profits are shown to have accrued, give a decree

for profits by way of damages, or as a punishment for the infringement.

The appellees, in the endeavor to obtain a substantial award, were therefore obliged to show damage by reason of the alleged infringement. The Master was of opinion that they had failed to establish the proposition, and he was clearly right in his conclusion. The matter of the fourth and seventh exceptions, stated in the seventh and eighth assignments of error, present the only subjects upon which the Court differed with the Master, and upon which the opinion and decree are based. In reaching his conclusion the learned Judge, upon insufficient and inadmissible evidence, found the *complainants'* profits upon *its* carpets to be a certain sum; and, having the number of yards of carpet sold by the defendant, *presumed* that the infringing carpets displaced the others in the market, and hence that the *whole* profit which would have accrued to the complainants thereon, in every stage of the manufacture thereof, had they made and sold the same, is the measure of their damages, and ordered a decree accordingly.

There are several objections to this conclusion, not only on the evidence as it appears in the record, but in the law. The statute gives "actual" damages.

Philp *vs.* Nock, 17 Wallace, 460.

And these must be proved, not guessed at. Ib.

In Seymour *vs.* McCormick, 16 Howard, 480, cited on this point in Root *vs.* Railway, 105 U. S. 197, the Court said that "actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact;" and this was said in a case in which the Circuit Court had instructed the jury that the plain-

tiff's damages might be determined by ascertaining the profits which, in judgment of law, he would have made, provided that the defendant had not interfered with his rights, and that the rule applied whether the patent covered an entire machine or merely an improvement on it. The instruction was decided to be erroneous. This Court said: What a patentee *would have made*, if the infringer had not interfered with his rights, is a question of *fact*. It is not a judgment of law or legal inference that third persons would have bought of the patentee what they bought of the infringer, if the latter had not made and sold the thing patented. Such a rule of damages would be better entitled to the epithet of *speculative* rather than *actual*. Nor is it proper to say to the jury that the same rule applies where the patent covers an entire machine or part of a machine; for by such a doctrine the defendant might be compelled to pay to a dozen different patentees of parts of the machine the profits on the whole, and "actual damages" to the plaintiff might be converted into an unlimited series of penalties on the defendant.

In Walker on Patents, sec. 563, after citing Seymour *vs.* McCormick, says: "In order to show that a patentee would have made a particular profit, if an infringer had not forestalled his sales, it is necessary to show that he would, but for that infringer, have made those sales; and to that end it is necessary to show that he *could have supplied* the articles wanted, and that the persons wanting these articles *would have bought* them of *him* had no infringer interfered,—citing

Goodyear *vs.* Bishop, 2 Fisher, 161.
Magic Ruffle Company *vs.* Douglas, 2 Fisher, 340.
Sargent *vs.* Manufacturing Company, 17 Blatch. 247.
Ingersoll *vs.* Musgrove, 3 Bann. & Ard. 304.

The language of these cases applies with great force to the case at bar. The learned Judge was undoubtedly wrong in saying, in his opinion, and founding his judgment thereon, that "all that is left for *presumption* is that the infringing carpets displaced on the market the complainants' carpets, and hence that the profits which would have accrued to them upon the quantity of carpets put upon the market is the measure of their damages." No such presumption arose, and no such inference could be drawn from the mere act of infringement; it was a question of *fact*, vital to the plaintiffs' case, and the onus upon it to prove by affirmative evidence that the defendants' sales displaced plaintiffs' goods in the market. They not only failed to prove this, or offer any evidence that they *could have supplied the demand*, or that they *would*, or *could*, *have sold to defendants' customers* a yard of the carpet which defendants sold. Apart from this, there was no competent evidence of what profit, if any, the complainants realized on *their* carpets. The only testimony upon these questions was that of Fowler (Record, pages 53 and 74), and his testimony was excluded by the Master as inadmissible, being merely hearsay, and founded on memoranda taken from the appellees' books, which they expressly refused, after call, to produce. And after the case was referred back to the Master, on the application of the appellees, they failed again to produce the books, or supplement the proofs with any other evidence to take the place of the books.

Under these circumstances the appellee was entitled to a nominal award only. To recover "actual damages" given by the statute, it was bound to furnish evidence by which they might be assessed; such damages cannot be guessed at; they must be calculated, not imagined, and data must be furnished

by the patentee to enable the same to be ascertained with reasonable accuracy. City of New York *vs.* Ransom, 23 How., 487; Burdett *vs.* Estey, 3 Fed. Rep., 566.

But the Court, even though it had been right upon the point last argued, was clearly wrong in giving the appellees the entire profit on the manufacture and sale of the carpet. It was the *design* that was patented, not the *carpet* as an article of manufacture. Had it been produced upon a patented loom, the appellants, under this ruling, would have been obliged to pay the whole profits twice on it; and had it been colored by a patent dye-stuff, they would have had a third time to pay the *whole* profit. And the inapplicability of the measure adopted by the Circuit Court would be still more apparent in case of a design patent for a new form or configuration. An article of the new form may very well be covered by two patents in the hands of different persons. A user of such article, if obliged to pay the whole profit to the owner of the design patent, would again be liable for the whole a second time to the patentee of the article itself irrespective of its novel configuration or ornamentation. This reasoning, as shown in Seymour *vs.* McCormick, proves the justice of the rule that puts the onus on the patentee of showing not only that his invention gave value to the thing to which it was applied, but the extent of that value; it is this latter, and nothing else, that belongs to him, and for which the defendant is liable to account.

The recovery must be limited to such profits as arise from the manufacture and sale of the patented feature. The plaintiff's damages, too, must be proved, and not left to conjecture; and *the fact that it is impossible to separate the profits arising from the improvement from those incident to the manufacture of the whole machine, is an insufficient reason for awarding*

the plaintiff more than he is justly entitled to receive. Philp *vs.* Nock, 17 Wall., 460; Calkins *vs.* Bertrand, 8 Fed. Rep., 755; Gould Mfg. Co. *vs.* Cowing, 12 Blatch. 243. In case he is *unable* to prove how much of the entire profit upon the machine is due to the patented part, he can recover only nominal damages. Blake *vs.* Robertson, 94 U. S. 728.

There was no proof of either profits or damages here; indeed latter were *presumed*, and upon insufficient evidence of an alleged falling off in appellee's sales of *a* carpet (not necessarily or in fact the same kind as appellants) bearing the design, and this alleged decrease was *inferred* to be due to the alleged infringement; nor was there an attempt to show any increase in demand over *other* carpets, or any increase in market value of *the* carpet by reason of the patented design. The record is barren of any proof on which a substantial award could legally be founded.

As was said in Maier *vs.* Brown, 17 Fed. Rep., 737—"Defendants sales may have been the result of superior energy, diligence and business capacity, or of the incidents of trade; and we think the burden is on the plaintiff to show that such sales were attributable to the increased value given to the article by the patent."

A design, either as a novel form or configuration of an article, or as an ornamentation thereof, may, if it does not happen to suit the public taste, just as likely retard and stop the sale of the article, to which the new form or ornament is given as increase it, and, in judgment of law, a thing does not necessarily possess any inherent, intrinsic, or even commercial value, or impart such to anything to which it is attached or forms a part, merely because it is patented. This is purely a question

of fact, and must be proved, as any other fact in the case necessary to support the decree must be proved, by competent and sufficient legal proof.

Again, the patent says the design is applicable to carpets, oil cloths, and similar articles. The inapplicability of giving the patentee, as damages, the whole profit upon the manufacture and sale of the carpet itself, and estimating the same upon the supposed loss of sales of *its carpets*, would be shown by supposing that the appellant's alleged infringement had consisted in stamping the design upon an oil cloth, or weaving it into an expensive tapestry, or weaving it in white threads in table linen, or printing it upon a window shade; and this supposition is no more irrelevant than the facts here justify, for the appellants actually did use the alleged infringing design upon a carpet of a very different quality, and because, thereof, selling for a different price from those made by appellees, bearing the patented design in question.

Again, the proof do not show which of the nineteen separately-claimed designs, covered by the patent, were used by appellants, and which of them were used by appellees, or which was compared with which, or which of them obtained the alleged popularity referred to in the proofs; and it is said, in reported cases, that if an infringer use but a small part, or element of the patented improvement, he will not be decreed to pay as much as one who takes the whole; and, for ought that appears in the proofs, the appellants may have used the smallest part, for instance, the "spider-like ornaments having legs, head, and tail" of the fourth claim; and the *appellee's* carpets may have had the whole design, as covered by the nineteenth claim, which they say was so popular, and have compared the former with the latter, much to the injury of the appellants.

In Westcott *vs.* Rude, 27 O. G. 719, it is said that if a patent has two or more claims, each of value and distinct from the others, one cannot equal all in value any more than in mathematics a part can equal the whole; and an infringer cannot be decreed to pay for a part as much as a licensee pays for the whole.

It may very well be that it is impossible in some cases to prove the profit or advantage due to the invention, and that in some other cases no such advantage exists; but for neither of these reasons [see Elizabeth *vs.* Pavement Company, 97 U. S. 126, Livingston *vs.* Woodworth, 15 How. 559, Black *vs.* Thorne, 111 U. S. 122] should a defendant be mulcted in a substantial sum, whether as profits or damages, or both, based upon speculative deductions from insufficient evidence, that hardly rise above the dignity of guesses, and resting on unwarranted legal inferences, where the statute gives only "actual" profits and damages, based upon actual legal proof of the facts necessary to establish such profits and damages.

Nor does there arise any legal *presumption* that the sales of either plaintiff or defendant were due to the patented design; or that, if the defendants had not sold the 1100 yards of carpet made by them, the plaintiffs would have sold that much more than they did sell. This is, in like manner, *a question of fact* to be *proved.*

In Buerk *vs.* Imhauser, 2 B. & A. 452, the Court said, "If the profits on plaintiff's trunks were no larger than on an ordinary trunk, it would indicate that he suffered no damage legally capable of estimation. It is true that the defendant may have sold trunks which the plaintiff would have sold if defendant had not infringed, but the damages thereby occasioned cannot be inferred without legal proof." Applying this ruling to the

case at bar, it could be stated in this wise: the proofs show that the price obtained for the carpet sold was no greater than it would have been without this particular design; nor were the sales of carpet increased thereby; and these facts go to prove that the addition to, or use of, this design on the carpet sold by either appellants or appellees did not increase the sales, or produce any increased profit to either, over any other carpet of like quality then in the market; nor that the appellants' sales of a different carpet bearing this design caused any "actual" damage to the appellee; certainly none legally capable of estimation. Such "actual" damage the Court inferred, from the bare statement that the appellee's sales fell off to some extent in the second season, though this might have been due to a previously partially satisfied demand, or from a dozen different causes with which the appellants' acts did not have the most remote connection; or, as the Court said, in Maier *vs.* Brown, Ib., from the superior business facilities of the appellants to sell carpets in general, or from the mere incidents of trade.

Prior to the act of 1870 no damages, as such, could be recovered in a proceeding in equity for infringement of a patent; nor even the defendant's profits, unless, at the time of filing the bill, the plaintiff was entitled to and prayed for an injunction as part of the remedy sought. The account was merely an incident to the suit for injunction, and, since that act, the right to claim damages is merely an incident to the right to an account.

Root *vs.* Railway Company, 105 U. S. 202.

It may, therefore, be doubted if a plaintiff can, in equity, omit the claim for account, or afterwards waive it entirely, and

seek only his injunction, and damages as such. Certainly not, if, when the decree is pronounced, the right to injunction is lost by reason of expiration, or near expiration, of the patent; and when it appears that damages was the main object of the suit. It would be contrary to all precedent to convert a court of equity into an instrument for the punishment of simple torts.

There are other objections to the decree, viz.: the invalidity of the patent, on which the appellees bill is founded. It may be conceded that the patent is *prima facie* evidence, both of novelty and utility of the design (105 U. S. 94), but, as in the case of patent for mechanical inventions, the specification may disclose want of patentability, on the face of the instrument, in which event the Court will, of its own motion, declare it void, though the issue be not raised on the Record.

Slawson *vs.* Railroad Company, 107 U. S. 649.

It is respectfully contended that this patent is void on its face, for that it contains nineteen separate and distinct claims for as many separate and distinct designs; several of which are distinct inventions not necessarily connected with or having any relation to each other, and several others of which are well known ornaments, such as rosettes, Maltese crosses, etc., without any alteration or arrangement making them to differ substantially from those in common use, and of which almost every person possesses a knowledge, and of the existence of which the Court will take judicial notice, as in the case of a mechanical patent. Phillips *vs.* Detroit, 111 U. S. 606, citing Terhune *vs.* Phillips, 99 U. S., 592; Brown *vs.* Piper, 91 U. S., 37, and King *vs.* Gallun, 109 U. S., 99. These things, unless making up a whole, may be likened, in one aspect, to a part of a machine which, isolated from the machine and claimed

by itself, does not possess any distinctively operative capacity, or thus bear any relation to the whole, and cannot, therefore, be so claimed.

And it would seem also, in the case of designs, which are called inventions in the statute (and the Court has said, in Northrup *vs.* Adams, 12 O. G., 430, that there must be *invention* involved in the production of designs) that, as in the case of mechanical inventions, the law would require more than a mere juxtaposition of old figures disconnected in the pattern; in fact a substantially new arrangement producing a new effect on the eye, or a substantial change of form (in case of a patent for a new configuration as distinguished from mere ornamentation); and more than a mere change in the order in which such old and well known figures were placed, and not thereby producing a novel resultant effect. A mere aggregation of old ornaments is not patentable. In Simpson *vs.* Davis, 12 Fed. Rep., 144, which was a case on a design patent, the Court said:

"The claim does not seek to secure the scroll by itself nor the bead by itself, nor the roses by themselves. Each of these is an ornament; but neither of them are new. The claim therefore seeks to cover these forms, associated together in the manner described, as composing a single ornament. In matter of ornament mere juxtaposition of old forms is enough, if thereby a component whole, having a substantially *new effect*, is produced. The *effect* must, to some extent, be *new*. I find it difficult to consider that the scroll, roses, and bead, when arranged as described, constitute a *single* ornament. There is no *commingling of the lines* forming the scroll, roses, and bead; no new idea seems to be embodied in their arrangement. All that has been done is to place there distinct and well-known ornaments, one above the other, without the production

of any such combined effect as to entitle the whole to be treated as a new and original ornament. No new ornament has, in fact, been produced. If therefore the plaintiffs' action rested on the 5th claim of the patent, I should hesitate to uphold it."

In Western Electric Co. *vs.* Odell, 18 Fed. Rep. 321, the Court approves of Simond's statement of the law (Sim. on Des. Pat., p. 212), and also of Wooster *vs.* Crane, 2 Fisher, P. C., 583, and Northrup *vs.* Adams, 2 B. & A., 567. In the latter case the Court said: "The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention. If a combination of old designs be patentable at all—of which I have some doubt—the combination must be such as to produce a *new appearance*. If the effect produced be simply the aggregation of familiar designs, it would not be patentable."

In above case (18 F. R., 321), which came on for hearing on demurrer to bill, the Court dismissed the bill on the ground that the Court could take notice of what was in common use (following Brown *vs.* Piper, 91 U. S., 37), and hold that the design shown in the patent did not disclose patentable novelty.

As respects such as these, if the law of patents for mechanical inventions is applicable, they would be held not to possess patentability, and render the patent *pro tanto* void. In Norton *vs.* Nichols, 28 L. J. (Queen's Bench), 225, Lord Campbell delivering the opinion of the Court said, that the result of the combination to be protected must be one design, not a multiplicity of designs. And equally so would it seem to be the case with such combinations of elements of the design claimed separately, that if they formed *per se* separate and distinct designs not necessarily connected with the whole, or with other minor

combinations of other elements, that they were in effect and in fact separate and distinct inventions, and that a patent claiming such would be for more than one invention.

And would be void for that reason. Wyeth *vs.* Stone, 1 Story, 273; Evans *vs.* Eaton, 3 Wheaton 454; Barrett *vs.* Hall, 1 Mason, 447; Hogg *vs.* Emerson, 6 Howard, 437.

In the leading design case of Holdsworth *vs.* McCrea, 2 L. R. (H. of L.), 380, which was an appeal from the decree of the Court of Exchequer Chamber (L. R. 1 Queen's Bench, 264), which had affirmed a previous decision of the Court of Queen's Bench (5 Best & Smith, 495), the House of Lords affirming the original decree; the appellee had brought suit for infringement of a design for ornamenting woven fabrics, which he had registered under the copyright for designs Act of 5 and 6 Vict. c. 100, sec. 3. The claim, the Court said, was for "the particular collocation of the shaded and bordered stars upon the ornamental chain surface, as shown in the registered pattern, thus forming together the ornamentation of the woven fabric." The Court said, if what he claimed as his design consists, according to the pattern, of different parts, any one of which might be deemed a "design," his registration of the whole pattern amounts to a claim for the combination, not of any of the parts thus combined, any one of which, therefore, taken separately, is not protected; though the Court found that the parts, viz.: the shaded and bordered stars, and the ornamental chain surface, were each new.

This case is cited as showing, not that the patentee could not have obtained separate copyrights or registration for the whole, and for each separate novel part, but that the Court

thought each novel part, or minor combination of parts, was a separate and distinct design, the shaded star not being, as a design, necessarily connected with, or having any relation to, the ornamental chain surface as another design, and would, under our law, being separate and disconnected inventions, have required to be protected by separate and distinct patents; otherwise, if a pattern contained a hundred such, or every possible conceivable design imaginable, without limit or number, they could, by a multiplicity of claims, be protected by one patent, which would be clearly contrary to the spirit and meaning of the statute.

Again, this patent is open to other criticisms for defects appearing upon its face. It is impossible, reading the specification with the drawings, to see and understand the elements and the arrangement thereof, of the several minor combinations claimed, which latter are not clearly, fully, and exactly described as required by law; and the numerous claims add to the perplexity of obtaining such an understanding. It was said in a reported case, that where a specification by ambiguity, and a needless multiplication of nebulous claims, is calculated to mislead and deceive the public, the patent is void. Such is undoubtedly the case with the patent in question.

Upon the whole case, as presented, it is respectfully and earnestly urged that the decree of the Circuit Court is erroneous and should be reversed.

H. T. FENTON,
R. P. WHITE,
Counsel for Appellants.

FILED
JAN 17 1885
JAMES H. McKENNEY,
CLERK.

114-439

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

DOBSON
vs.
HARTFORD CARPET CO.

No. 231.

BRIEF FOR APPELLEE.

ARTHUR v. BRIESEN,
Counsel for Appellee.

Evening Post Job Print, 208 Broadway, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 231.

JOHN DOBSON AND JAMES DOBSON, Trading as John and James Dobson, and also as "The Falls of Schuylkill Carpet Mills,"

Appellants,

vs.

THE HARTFORD CARPET COMPANY.

BRIEF ON BEHALF OF THE APPELLEE.

Statement of Facts.

This was a suit brought by the complainant below, The Hartford Carpet Company, against the appellants, for infringement of a design patent that had been issued to the complainant March 18, 1879 (No. 11,074), for a new design for a carpet.

The bill (filed April, 1879), charges, amongst other things wilful infringement of the patent, with knowledge thereof, and continued infringement after notice had been given, requesting defendants to desist. The defendants failed to answer the bill, and a rule was entered (page 5), taking it *pro confesso*, after which, in September, 1879, the decree,

ordering a perpetual injunction and a reference to a master was entered. This decree will be found on pages 5 and 6 of the Record.

Proceedings were taken before the Master in obedience to this decree, the testimony before him being contained on pages 10 to 52 inclusive of the Record. This testimony consisted, first, of a statement made by James Dobson, showing that the defendants had made and sold twenty pieces *à* 55 yards of the infringing carpet, making in all 1,100 yards. A sample of the infringing carpet is in evidence; likewise a sample of complainant's patented carpet, and a copy of the patent in suit. From these it appears that the defendants' carpet was a complete counterfeit of the patented carpet in every line, shade and figure.

Testimony was taken by consent in New York, in the absence of the Master, to be submitted to him for his determination of the questions at issue in three different suits. This testimony embraced the depositions of William James, David M. Read, John H. Worth, William Fowler and Francis T. Holder.

All this evidence was taken solely in behalf of the complainant. No evidence was taken by the defence. The Court will find, from the proofs, that the following facts are established :

First.—The patented goods of complainant were first put upon the market in the spring of 1879. In the first season the extraordinary sale of eight hundred pieces of this design was effected. In the next entire year only about three hundred and eighty pieces were sold. (Fowler, page 36.) The reduction in these sales is attributed by Mr. Fowler to the defendants' infringement, he estimating that, had it not been for the infringement, the sales in the second year would have been fully up at least to the sales of the first six months, to wit, eight hundred pieces, whereas, in fact, only three hundred and eighty pieces were sold. The witness James holds to the same view (p. 16, 17, of Record).

Second.—Fowler further testifies that from twenty to

thirty looms were run by the complainant on this particular pattern of goods (Answer 19, page 37), and that after the infringement came out, an expense of about $3,000 was incurred by complainant in making other designs and experiments with which to keep busy the looms that had been rendered idle by the infringement (pages 37 and 38).

THIRD.—Fowler further shows, the bill alleges and defendants do not deny, that before this suit was commenced the defendants were notified to discontinue the infringement (page 46 of the Record), and after the notice had been served they still sold their infringement (Answers 145 and 146, page 51).

FOURTH.—It is further shown by the witness Holder, upon careful estimates made by him, he being a proper person to make the same, that the patented carpet of the complainant cost from $1 to $1.08 a yard to produce at the time these infringements occurred (Answer 11, page 48), and it is proven by Mr. James, who has special aptitude for knowing the fact, that the Hartford Carpet Company's patented carpet sells in market at the rate of $1.75 a yard. (Answer 24, page 16).

FIFTH.—It further appears, from James' and Read's testimony that the infringing goods are of inferior structure as compared with the genuine patented goods of complainant; that they are sold at a price below that, at which the complainants' goods are sold, and that the existence in market of the same pattern, in inferior fabric, destroys the sale of the higher priced genuine goods. The testimony on this subject is very full (see pages 16 and 17 of the Record; also, pages 20, 21 and 22; Read, pages 25 to 27).

SIXTH.—The defendant James Dobson shows by the figures given on page 10 of the Record, that the defendants' goods were sold without profit.

These being the proofs, so far as the complainant could reach them, the defendants permitted the case to go before

the Master without the introduction of proofs in their behalf, assuming probably that the *onus probandi* had not been shifted by the complainant. The Master held with them, and found, as his report will show (pages 7 to 9 of the Record), that the complainant was entitled to nominal damages only, principally because the Master was unable to find the actual decrease of sales of complainant's goods, that had been occasioned by the infringement. In his report the Master dwells at length upon the fact, that complainant's books were not produced by the witness Fowler, from which books it would have appeared definitely, how many pieces of the patented carpet the complainant had actually sold. In this connection it seems proper to remind the Court of the fact, that the testimony of the witness Fowler was taken in the absence of the Master, and that when the books in question were called for (page 42 of the Record), counsel for complainant stated, that he would not produce them, *unless the Master ordered their production.* When the case went to the Master, instead of ordering the production of the books, he filed a report, finding against the complainant, principally because of their non-production. He filed this report with rather surprising haste, as the affidavit of Mr. Fraley, on page 54 of the Record, will show, and when, thereupon, the Court was induced to order the Master to entertain a motion for re-opening the proofs (see page 55 of Record), the Master made a supplemental report (pages 55 and 56), in which he finds that, although the books were now proffered, he would not allow them to be produced, because their production would be wholly immaterial to the finding.

This last ruling, coupled with the statement of the Master in the original report (page 9), to the effect, that he gives full credence to the testimony, leaves Mr. Fowler's figures of the sales of the patented goods unassailable. For, it must be remembered that the Master made the supplemental report, in which he ruled out the production of the books in question, under the force of defendants counsel's argument, which requested the Master so to rule.

Exceptions were filed by complainant to the report and supplemental report of the Master (page 57), and these

coming on to be argued, the Court, through Judge McKennan, found: that the infringing design was the exact counterpart of the patented one; that the carpets, embodying it, were put upon the market by the respondents after the date of the patent and after the introduction of the carpets, containing the patented design, by the complainant; and that, from the fact of no defense being made, and other considerations, the Court finds the defendants to be in the attitude of wilful infringers. (That they are infringers, by profession, of other parties' design patents is proven—Answers 113 to 115, page 24—and not denied.)

In view of these facts, the Court holds: that, under the circumstances, the defendants ought to be held to the most rigid accountability; that no intendment ought to be made in their favor because of alleged inconclusiveness of complainant's proof of loss; and that such proof ought to be considered and interpreted most liberally in favor of complainant within the limit of an approximately accurate ascertainment of its damages. And the Court then finds, that the defendants having sold 1,100 yards of the infringing carpet, and it appearing that complainant's profit on each yard of the genuine carpet was 67 cents, the complainant lost this 67 cents on each of said 1,100 yards, and that its damages are therefore $737.00. A decree ordering judgment for that amount, with costs, was thereupon entered (page 60), and from this decree the defendants have taken this appeal.

We presume that the object of the appeal is, to induce this Court to hold, that it is error to find as damages the profit the complainant would have made, had it sold as many yards of the patented carpet, as defendants had sold yards of the infringing carpet.

ARGUMENT.

In ordinary cases of inadvertent or unintentional infringement of design patents, it may become a matter of considerable difficulty to the Courts, to determine the proper method of ascertaining damages. Our researches

have failed to disclose a single adjudication of this question in the case of a design patent. But no difficulties appear to be connected with the present case, for inadvertent infringement cannot be pleaded by the defense. Theirs was the deliberate counterfeiting of the complainant's design.

Carpets, to which the design in suit pertains, are sold entirely through their design. A carpet without a design would be unsalable. The witness James testifies to an evident fact, when he says, that the designs control the sales of carpets (page 18), and that "parties ask for the picture, and buy that wherever they can find it" (Answer 35, page 17).

Hence, a design for a carpet, so far as a patent affords protection, bears some analogy to the protection given by a trade-mark or by a copyright. In fact, copyright protection seems to approach nearest to that, afforded by a design patent on goods of this kind. A book without the copyrighted words and letters on its pages, a painting without the paint, would be valueless to the same extent, as a carpet is without the design. The rules, therefore, which govern protection by copyright may well be inspected in connection with the questions at issue in this cause. The more pertinent does this comparison appear to us, because in a copyright case, the same as in the case at bar, it is well nigh impossible, that accidental infringement can occur. Wilful infringement of a copyright for a book may always be presumed, when it is found that the counterfeiter has copied word for word from the original. Wilful infringement in the present case is charged in the bill, and admitted, and is likewise evident from the fact that every line and dot, and every shade and tint, of the original design has been copied by the defendants. Hence, as the Court below truly said, "no intendment ought to be made in the defendant's favor founded upon the alleged inconclusiveness of the complainant's proof of loss." The Court below received this rule from the decision of this Court in Rubber Co. *vs.* Goodyear, 9 Wallace, 788, 803, where it is stated:

"*The conduct of the defendants in this respect has not*
"*been such, as to commend them to the favor of a Court of*

"*Equity. Under the circumstances every doubt and diffi-*
"*culty should be resolved against them.*"

But what is this proof of loss? *Non constat*, that, because the Court found a loss to the complainant, equivalent to the sale of twenty pieces, the proofs may not show an even *greater* damage and a greater falling off of sales. Or in other words, if there were in the proof an absolutely clinching and convincing figure, showing that, but for the infringement, the complainant would have sold so many hundred pieces more of the patented goods, than it actually did sell, the Court would have been induced, and, under the rules, obliged, to accord the complainant a recovery for such loss.

We have already referred to Mr. Fowler's testimony, from which the Court will perceive that the complainant, through Fowler, its agent, *believes*, to say the least, to have lost the sale of some three or four hundred pieces of the patented goods, because of this infringement by the Dobsons, and Fowler's testimony in this connection is based on figures and on facts, which take his conclusions out of the realm of conjecture.

The witness James also testifies (Answers 31 and 32, page 17), that the patented patterns "would for future years have sold in immense quantities every season, and would never leave the market if imitations were not made;" and (Answers 33 and 34, page 17) that beyond peradventure the Hartford Carpet Company would have sold their patented goods to the purchasers of the infringing goods, had it not been for the fact that the infringing goods were in the market. For purchasers of carpets, who are ordinarily unable to distinguish between the varying *qualities* of carpet, will buy where they can get the goods, that look alike, at the lowest price. See Answers 36 and 37, page 17; also, 48 to 51, page 19; and 78, page 21, where Mr. James testifies that the pattern in question is sold in all seasons, being a leading pattern, and that that is the reason, its sale would not deteriorate, but for the production of copies (Answers 90 and 91, page 22). In question 93, the witness is asked:

"*Have you yourself personal knowledge of people de-*

clining to buy these genuine goods of your house (the house of W. & J. Sloane, New York), because of the existence of the infringing pattern at a lesser price?

And answers:

"THEY ALWAYS DECLINED *the price of the original, as they could get the copy so much cheaper.*"

Mr. Read, also, on the lower part of page 25, shows at length, why the sale of the genuine goods is affected by the sale of the counterfeit; that, in fact the latter within the knowledge of the witness, in most cases destroys pretty much the sale of the original design. He testifies further in this connection that, in his opinion, the sales by the defendants did, at least, supplement the sales of an equal number of the original goods (Answers 41 and 42, page 28).

From all this evidence, which, if it were not absolutely true, or if it could have been gainsaid, the defendants would undoubtedly have made haste to rebut, the Court will find, that the actual loss suffered by the complainant, because of the infringement was far more than the amount awarded by the Court. The expense occasioned by the changing of the looms alone is shown by Mr. Fowler to have exceeded the award, and the loss of hundreds of pieces of carpet of a leading pattern, which is proven to have been occasioned by the infringement, amounted, as a matter of fact, to many thousands of dollars, and not to the few hundred, which the Court has actually found to be due the complainant.

We beg to refer the Court to a few authorities which seem proper references in connection with this question.

In the exceptional case, as it was characterized by the Chief Justice, "Manufacturing Company *vs.* Cowing," 105 U. S., page 253, the difference between the cost and the selling price in a patented pump was given as the measure of damages, it appearing that the defendant had made considerable profit by his infringement. This equitable decision clearly gave the complainant a substantial return for the loss, the acts of defendant had occasioned him, although it may perhaps be doubted whether a patentee should be obliged to accept the caprices of an

infringer as a norm for his recovery. For, if the infringer should have chosen to sell each pump for $10 less than the price at which it was actually sold, the complainant would have been as badly, if not more seriously damaged. Yet under the rule stated, his recovery would have been less.

In fact, the recovery of the difference between the cost to defendant of the infringing goods and the price at which he sold them, is in the nature of a recovery of profits, but not of damages. In the present case, as the Court will perceive (see the Master's first report), the complainant abandoned all claims to the gains and profits which had accrued to the defendants, and this advisedly, because the defendants showed, that they had sold the infringing goods without profit, simply for the evident purpose of damaging and withdrawing custom from the complainant.

The distinction which this Court makes in "Wooden Ware Company *vs.* The United States," 106 U. S., page 432, between intentional and unintentional wrong doers, may be justly applied to the present case. The design is the exclusive property of the complainant, and, as against an intentional wrong doer, belongs wholly to the complainant, when found in the hands of the intentional wrong-doer. Under the rule announced and commented upon in the "Wooden Ware" case, it would appear fair, that in the present suit the complainant should have been permitted to take possession of the twenty pieces of infringing goods, while the same were in the hands of the defendants, for the mere fact that the designs were found upon *fabrics*, that by the fabrics they might be said to have been improved in value, did not make a greater distinction than the fact that the wood in the "Wooden Ware" case had been rendered more valuable by the acts of the wilful trespasser. If a painter finds a counterfeit of his painting upon a wooden tablet, the painting *is his*, and therefore, also, the tablet. Hence, the Court would have been justified in awarding to the complainant the full value of the infringing goods.

Turning to the decision of this court, in "Garretson *vs.* Clark," 111 U. S., page 120, we find it there announced

that it behooves the complainant in an ordinary patent case, to show by "*satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature.*" In the present case, we *have* shown that the entire value of the carpet as a *marketable article*, is properly and legally attributable to the patented feature, namely, to the design which is woven into the carpet, for without the design the carpet would not be salable at all, and would have no marketable value, would not, in other words, be a "marketable article."

In trade-mark cases, which, as already stated, bear a certain analogy to design cases, we find the rule to be very clearly laid down in harmony with the finding of the Court below in the present case.

The unreported case of "Faber *vs.* Hovey," which was decided by the General Term of the Supreme Court of the State of New York, the decision of which was sustained by the Court of Appeals, is given as follows in Coddington's Digest of Trade-Marks, § 249, page 79 :

"*On an assessment of damages by reason of an infringement of a trade-mark, the Referee found, that plaintiffs' damages were equal to the profits they could have made from the manufacture and sale of the same number of articles, which defendant had sold with the simulated trade-mark thereon. Held, on appeal, that there was no error in said assessment.*"

In "Hostetter *vs.* Vowinkle," 1 Dillon, 329, an injunction was granted to restrain the defendants from infringing on the plaintiffs' trade-mark, and damages were assessed at the amount of profits, which the plaintiffs would have made, if they had sold the same quantity of their cordial as the defendants had sold of theirs, under the spurious label.

In the French trade-mark case of "Tribouillet *vs.* Monnier," decided by the Tribunal of Commerce of the Seine, 1857 (see Blanc de la Contrefaçon, page 682), it was held, that the infringer of a trade-mark should restore to a complainant his own profits, and also the profits he had deprived the complainant of, should repair the wrongs he had

caused by the reduction of the price of the manufactured article, by the rise of value of the raw material, and should indemnify the complainants for all they had suffered in credit, and all expenses which they had to undergo in order to protect their rights, and the Court says:

"*On these conditions only can the great industries which honor the country, and which have too frequently to contend against the unjust manoeuvers of infringers, maintain and defend themselves.*"

In copyright cases the only authoritative rule on damages to be found in Drone and in Scrutton, is that laid down in "Pike *vs.* Nicholas," Law Rep. 5 Ch., 260, by Vice Chancellor James, who said, that in cases of piracy of copyright,

"*The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies.*"

If this is the correct rule to be invoked against infringers of copyrights, it seems to be the correct rule to be applied to the present case. Copyrights are granted for books, paintings and statuary. The purchaser of a counterfeited painting, it may well be assumed, would have purchased the original, had the counterfeit not been in market. It was that painting he wanted, that peculiar collection of figures, which pleased his eye. He was in the market to obtain it at the most reasonable figure. And thus it is with carpets. They are used to decorate our rooms in manner analogous to paintings. A person's taste and refinement may to a large extent be measured by the carpets, that are to be found in his house, and it is as much a matter of pride, therefore, to properly decorate one's floor as it is to embellish the walls.

Clearly the law respecting design patents was intended to stimulate improvements in the appearance of our fabrics to the same extent, as the law of copyright is intended to stimulate our artists towards producing superior paintings, and it cannot be denied that great progress has been made, since the enactment of the Design Patents law, in improving the appearance of our manufactures.

We may, therefore, well be pardoned for assuming that

the rule of damages laid down in copyright and in trade-mark cases is properly applicable to the facts of the present suit.

In addition the following authorities which apply to regular patent cases are respectfully referred to :

"*If the patentee has sustained damages, beyond those* "*arising from the actual interference of the defendant in* "*making and putting into market similar machines, he* "*may recover them.* THE QUESTION OF DAMAGES IS VERY "MUCH AT LARGE, AND RESTS IN THE SOUND DISCRETION OF "THE JURY."

Seymour *v.* McCormick, 16 How., 480.

"*In an action for infringing a patent, the* DAMAGES *are* "*not to be estimated according to what the defendant has* "*made, or might have made, but according to what the* "*plaintiff has lost.*"

"*If the patentee has been ready to supply the market,* "*and the defendant, by his infringements, has diminished* "*his sales, the damages will be the profits the plaintiff* "*has consequently failed to receive.*"

McComb *v.* Brodie, 5 Fisher, 384.

"*If the patentee is engaged in manufacturing the pat-* "*ented article for sale, his damages will be manufac-* "*turer's profits.*"

Westlake *v.* Cartter, 6 Fisher, 519.

"*The amount of profits on a manufactured article is* "*not always the rule of damages for an infringement.* "*The court should endeavor to ascertain the damages* "*which resulted to the plaintiff by the unauthorized use* "*of his invention.*"

Magic Ruffle Co. *v.* Elm City Co., 14 Blatchford, 109.

"*Compensatory damages for the infringement of letters* "*patent may be allowed in equity, although the business* "*of the infringer was so improvidently conducted as to* "*yield no substantial profits.*"

Marsh *v.* Seymour, 7 Otto, 348.

"*Gains and profits are the proper measure of damages* "*in equity suits, except in certain cases where the injury* "*sustained by the infringement is plainly greater than* "*the aggregate of what was made by the respondent.* * * * "*Examples of the kind may be mentioned as falling within* "*the exception, where the business of the infringer was so* "*improvidently conducted that it did not yield any sub-* "*stantial remuneration beyond expenses, and cases where* "*the products of the patented improvement were sold by* "*the infringer greatly below their just and market value,* "*in order to compel the owner of the patent, his assignees* "*and licensees to abandon the manufacture of the pat-* "*ented product.*"

Birdsall *v.* Coolidge, 3 Otto, 69.

"*The terms profits and damages as used in the Patent* "*Act are not convertible.*"

"*Damages are to be awarded 'in addition' to the for-* "*mer. Profits, doubtless refer to what the defendant has* "*gained by the unlawful use of the patented invention,* "*and damages to what the complainant has lost.*"

"*In equity, under the existing laws, a complainant can* "*recover both profits and damages.*"

Goodyear Dental V. Co. *v.* Van Antwerp, 9 Off. Gaz., 497.

Respectfully submitted,

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New York, January 10, 1885.